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In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS

v.

WILLIAM BAIRD, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Jurisdictional Statement

FRANCIS X. BELLOTTI
Attorney General
GARRICK F. COLE
MICHAEL B. MEYER
THOMAS R. KILEY
Assistant Attorneys General
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1038
Attorneys for Appellants

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Jurisdictional Statement

The Attorney General of the Commonwealth of Massachusetts, on his own behalf and as attorney for the district attorneys of the Commonwealth's ten administrative districts, submits this statement in support of his appeal from a final order and decision of the United States District Court for the

District of Massachusetts once again holding Massachusetts General Laws ch. 112, § 12S, unconstitutional and enjoining appellants from enforcing it. The Attorney General contends that the District Court's decision incorrectly interprets the Fourteenth Amendment to the Constitution of the United States and various decisions of this Court holding other state statutes related to the regulation of abortion surgery unconstitutional. The Attorney General also submits that appellants' appeal presents substantial questions which go to the heart of the states' traditional authority to protect their minor citizens and to regulate the practice of medicine. Thus, these questions warrant this Court's plenary consideration.

Opinions Below

This case is before this Court for the second time. The District Court's original decision holding the statute unconstitutional was filed on April 28, 1975, and is reported at 393 F. Supp. 847 (D. Mass. 1975). This Court, in an opinion dated July 1, 1976, and reported at 428 U.S. 132, vacated the District Court's judgment on abstention grounds and remanded for further proceedings, including the certification of certain questions to the Massachusetts Supreme Judicial Court. The District Court certified nine questions to the Supreme Judicial Court on August 31, 1976, and the Supreme Judicial Court answered these questions in an opinion dated January 25, 1977. The Supreme Judicial Court's opinion appears in the official advance sheets at Mass. Adv. Sh. (1977) 96 and is published in the Northeastern Reporter at 360 N.E. 2d 288 (Mass. 1977). On February 3, 1977, the District Court issued its opinion and order granting a preliminary injunction against appellants, and this opinion is reported at 428 F. Supp.

854 (D. Mass. 1977). After trial in the fall of 1977, the District Court issued its opinion and entered a final order permanently enjoining appellants from enforcing the statute. This opinion, dated May 2, 1978, is reported at 450 F. Supp. 997 (D. Mass. 1978) and, pursuant to this Court's rules, is reprinted in the appendix to this statement (App. A).[1]

Jurisdiction

The Attorney General appeals from a final order of a three-judge panel of the United States District Court for the District of Massachusetts. A single district judge convened the three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 (1970) because plaintiffs-appellees' complaint sought permanent injunctive relief under 42 U.S.C. § 1983 (1970) against the Attorney General and the Commonwealth's district attorneys, the state officials charged with enforcement of the statute's provisions.[2]

In summary, plaintiffs' complaint in the District Court claimed that the statute violates the due process and equal protection clauses of the Fourteenth Amendment by requiring a physician to obtain the consent of a pregnant minor's parents before performing an abortion, thus, according to plaintiffs, imposing a burdensome and discriminatory requirement. Upon remand and after receiving responses to its certified questions from the Massachusetts Supreme Judicial Court, the

[1] On June 20, 1978, the District Court issued an amended final order correcting a typographical error in its order of May 2, 1978. Both of these orders are also reproduced in the appendix (App. B).

[2] 28 U.S.C. § 2281 (1970) was repealed by 90 Stat. 1119. However, the repeal effected by this statute did not affect actions commenced on or before its date of enactment. 90 Stat. 1119, § 7.

District Court handed down its decision and entered an order on May 2, 1978, permanently enjoining appellants from enforcing the statute. The District Court's opinion, the opinion of its dissenting member, and its order of May 2, 1978, as amended by its order of June 20, 1978, are reproduced in the appendix (App. A and B). Appellants filed their notice of appeal in the District Court on June 26, 1978. A copy of this notice is also reproduced in the appendix (App. C).

Appellants have claimed their appeal to this Court pursuant to 28 U.S.C. § 1253 (1970). Cases which appellants believe sustain this Court's jurisdiction are *Maher* v. *Roe*, 432 U.S. 464 (1977); *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976); and *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).

Statute Involved

The District Court determined that Massachusetts General Laws ch. 112, § 12S, as inserted by St. 1974, ch. 706, § 1, and renumbered by St. 1977, ch. 397, was unconstitutional. This statute differs significantly only in its codification identification from the statute which was before this Court in *Bellotti* v. *Baird*, *supra*.[3] The statute appears in the General Laws in the following form:

Section 12S.

> If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's

[3] The citation to the statute considered in *Bellotti* was G.L. ch. 112, § 12P. St. 1977, ch. 397, repealed § 12P and inserted § 12S in its place. Minor alterations in paragraphing and corrective reference changes without relevance to present purposes were also made.

> parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.
>
> Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve U.

Questions Presented

1. Whether G.L. ch. 112, § 12S, as inserted by St. 1974, ch. 706, § 1, and renumbered by St. 1977, ch. 397, violates the constitutional rights of certain minors (e.g., those capable of giving "informed consent" to abortion surgery, those for whom parental consultation would not be in their best interests, and those incapable of giving "informed consent") under the Fourteenth Amendment to the Constitution of the United Stated by prohibiting physicians from performing abortion surgery upon such minors without first obtaining parental consent or judicial authorization and is therefore invalid on its face.

2. Whether the District Court correctly determined that plaintiffs-appellees might properly challenge G.L. ch. 112, § 12S, on its face rather than as applied to certain minors (e.g., those capable of giving "informed consent" to abortion surgery and those for whom parental consultation would not be in their best interests).

3. Whether the District Court erred in refusing defendants-appellants permission to conduct a survey of health care provider consent practices in Massachusetts and in other significant ways failed to base its decision upon an adequate factual record.

4. Whether the District Court properly refused to enter an injunction carefully drawn to prohibit defendants-appellants from enforcing G.L. ch. 112, § 12S, only in those instances in which it had determined that enforcement would violate the constitutional rights of certain minors (e.g., those capable of giving "informed consent" to abortion surgery and those for whom parental consultation would not be in their best interests).

5. Whether the District Court may order the defendants to pay plaintiffs' litigation costs incurred in this Court and the District Court "lost because of defendants' mistaken advocacy."

Statement of the Case and Summary of Prior Proceedings

Plaintiffs-appellees commenced this civil rights action under 42 U.S.C. § 1983 (1970) in December, 1974. The original plaintiffs were William Baird, four female adolescents who sued under pseudonyms, Parents' Aid Society, Inc., and Gerald Zupnick. The original defendants were the Attorney General

of the Commonwealth and the district attorneys of the ten administrative districts. The District Court permitted certain parents to intervene as defendants and dismissed three of the adolescent plaintiffs and all of the intervening parents save Jane Hunerwadel from the case for want of proof. *Baird* v. *Bellotti*, 393 F. Supp. 847, 849-850 (D. Mass. 1975) (*Baird I*). Plaintiffs sought certification of the action as a class action, and, at least with respect to Mary Moe I, Parents' Aid Society, Inc., and Gerald Zupnick, the District Court determined that they were adequate representatives of the classes they sought to represent and certified the action "as a valid class action as to all." *Baird I* at 852.[4]

Plaintiffs brought their action as a "facial attack" on G.L. ch. 112, § 12P, as inserted by St. 1974, ch. 706, and now renumbered by St. 1977, ch. 397 (the statute), and sought declaratory and injunctive relief. *Baird I* at 849. The District Court granted a temporary restraining order and preliminary injunctive relief and, after trial, issued an opinion and entered an order permanently enjoining the defendants from enforcing the statute. *Baird I* at 857. Defendants appealed to this Court on May 16, 1975, and, in a decision dated July 1, 1976, this Court vacated the District Court's decision on abstention grounds and directed the certification of ambiguous state law questions to the Supreme Judicial Court. *Bellotti* v. *Baird*, 428 U.S. 132 (1976) (*Bellotti I*). Upon remand, the District Court certified a series of questions concerning the statute's requirements and standards to the Supreme Judicial Court. The parties filed briefs and offered oral argument to the Supreme Judicial Court in November, 1976, and, in an opinion dated January 26, 1977, the court answered the District Court's questions. *Baird* v. *Attorney General*, Mass. Adv. Sh. (1977)

[4] The District Court did not include Baird within its certification because of doubts about his standing. These doubts have never been resolved. *Baird I* at 851.

96, 360 N.E. 2d 288 (1977) (*Attorney General*). Proceedings and preparation for a new trial began in the District Court in early February, 1977.

Plaintiffs filed their first amended complaint on February 2, 1977. This amended complaint made slightly more explicit due process claims than the original complaint, omitted any reference to the statute's endorsement of "parental vetoes" in light of the Supreme Judicial Court's construction of it in *Attorney General*, asserted the statute's invalidity on overbreadth grounds, and claimed a denial of equal protection resulting from the exceptions contained in G.L. ch. 112, § 12F, as inserted by St. 1970, ch. 847, and renumbered by St. 1971, ch. 335, § 1. After a hearing on plaintiffs' motion for a preliminary injunction, the District Court, one judge dissenting, issued an opinion and entered an interlocutory injunction on February 10, 1978, against defendants' enforcement of the statute. *Baird* v. *Bellotti*, 428 F. Supp. 854 (D. Mass. 1977) (*Baird II*). Defendants commenced discovery on February 22, 1977, and the parties engaged in discovery for the next eight months. Planned Parenthood League of Massachusetts and others filed a motion to intervene as plaintiffs on April 1, 1977, and plaintiffs filed a motion for summary judgment on April 5, 1977. The District Court held an initial hearing on these matters on April 5, 1977, and set the motions to intervene and for summary judgment for further hearing on April 13, 1977. At this hearing, the court denied plaintiffs' motion for summary judgment and ordered the parties to meet to arrange a tentative schedule for discovery and trial. The District Court denied Planned Parenthood's motion to intervene on April 21, 1977.

On July 13, 1977, the District Court entered an order setting the case for pre-trial conference on August 22, 1977, and requiring completion of discovery by August 19, 1977. A single judge held a hearing on August 2, 1977, during which he announced that the court had denied defendants' motion for

leave to contact members of the plaintiff class, leave which they had sought in order to conduct a survey of the consent practices of Massachusetts health care providers. The District Court held a pre-trial conference on August 22, 1977, considered various discovery matters, attempted to clarify the issues, and set the case for trial on October 17, 1977. The case was tried on October 17 and 18, 1977.

The District Court, one judge again dissenting, handed down its decision and entered an order once again declaring the statute unconstitutional and enjoining defendants from enforcing it on May 2, 1978. Although the court's decision should be read in its entirety in order to apprehend the variety of conclusions it contains, it seems fair to summarize its determinations in broad terms as consisting of several related decisions, the chief of which amount to determinations that the statute imposes impermissible burdens upon and denies equal protection to some minors. In addition, the court concluded that, despite the Supreme Judicial Court's invitation, it would not undertake to carve the offensive portions of the statute as construed from its acceptable provisions but rather would enjoin all efforts to enforce any of its requirements. Finally, the District Court awarded plaintiffs their litigation costs in both the District Court and this Court "lost as a result of defendants' mistaken advocacy." *Baird* v. *Bellotti*, 450 F. Supp. 997, 1006 (D. Mass. 1978) (*Baird III*). On June 19, 1978, the District Court allowed Planned Parenthood's and various others' motion for post-judgment intervention over the objection of all parties, and on June 20, 1978, the court entered an amended order correcting a typographical error in its May 2, 1978 order. Defendants and defendant-intervenor filed their notices of appeal to this Court in the District Court on June 26, 1978.

The case which now presents itself for this Court's review is based upon a record substantially different from that which

the Court had before it in *Bellotti I*. However, despite the additional evidence presented to the District Court and the improved understanding of the statute's provisions which resulted from the abstention and certification process and the Supreme Judicial Court's opinion in *Attorney General*, the District Court has changed its analysis almost begrudgingly[5] and its ultimate conclusions not at all. Appellants argue in the following section that the issues involved in this case transcend the limitations of a single statutory enactment and implicate conflicting principles and values of national importance. The ultimate adjustment of these conflicts is an appropriate task for this Court.

The Questions Are Substantial

The District Court has declared unconstitutional and enjoined appellants from enforcing a statute which in large measure simply codifies the traditional Massachusetts common law rule that a physician may not perform surgery upon a minor without first securing parental consent. *See Attorney General* at 102-104, 110, 360 N.E. 2d 288, 292-293, 296; *cf. Reddington* v. *Clayman*, 344 Mass. 244, 246-247, 134 N.E. 2d 920, 921-922 (1956) (liability in tort for performance of operation on minor without parental consent). This traditional rule is not peculiar to the Commonwealth but is, rather, a restriction imposed nationally upon health care practitioners and has a lineage as well-established as that of the common

[5] For example, despite the Supreme Judicial Court's binding determination to the contrary, the District Court continues to suspect the Commonwealth's motivation and detects "a further manifestation of [its] originally found intent to recognize parents' rights . . ." inherent in the statute. *Baird III* at 1004 n.9.

law itself. As the old English and Massachusetts cases point out and the Supreme Judicial Court reemphasized in *Attorney General*, the guiding principle embodied in the common law rule and the statute which the District Court struck down is quite straightforward: promotion of a minor's best interests. *See Attorney General* at 102-104, 360 N.E. 2d at 292-293.

The District Court hardly acknowledges the statute's fundamental soundness in its opinion. Rather, the opinion concentrates on the special problems which pregnant minors, predominantly but not entirely adolescents, may experience if they seek abortion services. Then, without substantial knowledge of the consent practices of Massachusetts health care providers and on the basis of an erroneous interpretation of state law, the District Court concludes both that the statute would have an unnecessarily complicating and burdensome effect upon certain minors' ability to obtain abortion services and that it denies certain minors equal protection of the law. Further, although its opinion concerns only narrow subgroupings of the class of minors within the statute's scope, the District Court declared the statute unconstitutional in its entirety and enjoined appellants from applying and enforcing it against any physician, regardless of whether a particular case involved a minor in one of the special circumstances which concerned the court or a situation in which there would be no controversy over the appropriateness of enforcing the statute's requirements.[6] Finally, the District Court, apparently deter-

[6] For example, a non-controversial situation would be one in which the parents of a pregnant minor desired that she undergo an abortion but the minor desired to carry her fetus to term. (Without the statute's requirement that a physician must obtain the minor's consent as well as that of her parents, the usual common law approach which considers the minor's consent neither necessary nor sufficient would not serve as a bar to a physician's performing an abortion on the basis of parental consent alone.) Alternatively, a situation such as one described at trial by plaintiffs' expert would be one in which a minor, usually an adolescent, desires an abortion performed with-

mined to penalize as well as adjudicate, not only refused to enter a narrowly drafted injunction but also purported to award plaintiffs their litigation costs both in the District Court and in this Court. Appellants argue in the succeeding sections that: (1) the District Court's erroneous determination of the substantive constitutional issues involved in this litigation; (2) its willingness to entertain an unnecessary facial attack upon the statute; (3) its reliance upon an inadequate factual record; (4) its granting of unnecessarily broad relief; and (5) its punitive award of litigation costs present substantial questions of constitutional doctrine and the relationship between the federal courts and state government under our federal system which warrant this Court's plenary consideration.

I. This Court Should Review The District Court's Determination That The Statute Is Invalid On Its Face

This case is different from most of the abortion-related cases which this Court has considered since 1973. It is different because the statute involved relates only to minors and, rather than imposing outright prohibitions, simply structures the abortion decision-making process to protect the best interests of adolescents and children. These critical differences, appellants submit, should convince this Court that the District Court's decision presents substantial federal questions worthy of its plenary consideration.

This Court has never determined that legislation like the statute which the District Court struck down is an impermissible exercise of the state's traditional authority to regulate the practice of medicine and promote the best interests of its minor

out her parents' knowledge (a process ex hypothesi contrary to her best interests) but, when appropriately counseled, changes her mind, consults with her parents, and has a healthy growth experience.

citizens. On the two occasions in which the Court has considered closely related issues, it suggested that the validity of such legislation may well turn upon the exact nature of the statute's requirements and the effect it has on the ability of minors to obtain access to abortion services. *Bellotti I* at 147-151 (comparing its observations about the statute at issue in this case and that held unconstitutional in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976) [*Planned Parenthood*]). And at least four members of this Court have expressed their view that a statute which lacks the traditional protective objective and procedural safeguards of the statute involved in this case should nonetheless be considered a proper exercise of the state's police power. *Planned Parenthood* at 94-95, 102-105 (concurring and dissenting opinion of White, J., in which the Chief Justice and Rehnquist, J., joined, and Stevens, J., concurring and dissenting).[7]

The District Court's opinion makes little mention of the views of this Court's several justices. Indeed, when appellants

[7] Two other justices expressed support for consent legislation which did not "impose parental approval as an absolute condition upon the minor's right [which the statute in this case does not] but would assure in most instances consultation between the parent and the child [footnote to *Bellotti I* omitted]." 428 U.S. at 91. The statute as construed by the Supreme Judicial Court requires, if this requirement is constitutional, that minors consult their parents in all instances. *Attorney General* at 105-113, 360 N.E. 2d at 293-297. More recently, Justice Powell has suggested that the Constitution should recognize a line between "absolute obstacles" and "unduly burden[some]" requirements which, in the case of parental consent statutes, might divide parental veto statutes (like that before the Court in *Planned Parenthood* and which are considered invalid) from parental consultation statutes (like that before the Court in *Bellotti I* and that involved in this case). *Maher* v. *Roe*, 432 U.S. 464, 473 (1977). Justice Powell has also expressed the view that there is no "justification for subjecting restrictions on the sexual activity of the young to heightened judicial review. . . ." *Carey* v. *Population Services International*, 431 U.S. 678, 705 (1977) (Powell, J., concurring in part and concurring in the judgment).

brought these views to the court's attention, their efforts were rebuked:

> In their post-argument brief defendants have modified their contention, now relying for their assertion of constitutionality on their surmise of how the individual Justices felt, based upon deductions they draw from the separate opinions in [*Planned Parenthood*]. This surmise is quite unwarranted [footnote omitted]. *Baird II* at 855.

Appellants submit that the validity of the statute as construed by the Supreme Judicial Court presents a substantial federal question in light of this Court's previous decisions. Moreover, the District Court's decision, in light of the fundamental nature of the issues this case involves, should not be the last word.

As Mr. Justice Stevens observed in *Planned Parenthood*,

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. . . . [B]elow a certain age [a minor] may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable constraints on adults would be constitutionally impermissible. Therefore, the holding in *Roe* v. *Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.

> The abortion decision is, of course, more important than the decision to attend or to avoid an adult motion picture, or the decision to work long hours in a factory. . . . But even if it is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.
>
> The Court recognizes that the State may insist that the decision not be made without the benefit of medical advice. But since the most significant consequences of the decision are not medical in character, it would seem to me that the State may, with equal legitimacy, insist that the decision be made only after other appropriate counsel has been had as well. . . . A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decisionmaking process is surely not irrational. . . .
>
> If there is no parental-consent requirement, many minors will submit to the abortion procedure without ever informing their parents. . . . A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision.
>
> The State's interest is not dependent on an estimate of the impact the parental-consent requirement may have on the total number of abortions that may take place. I assume that parents will sometimes prevent abortions which might better be performed; other parents may advise abortions that should not be performed. Similarly,

even doctors are not omniscient; specialists in performing abortions may incorrectly conclude that the immediate advantages of the procedure outweigh the disadvantages which a parent could evaluate in better perspective. In each individual case factors much more profound than a mere medical judgment may weigh heavily in the scales. The overriding consideration is that the right to make the choice be exercised as wisely as possible.

The Court assumes that parental consent is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of available alternatives. This assumption is, of course, correct and consistent with the predicate which underlies all state legislation seeking to protect minors from the consequences of decisions they are not yet prepared to make. In all such situations chronological age has been the basis for imposition of a restraint on the minor's freedom of choice even though it is perfectly obvious that such a yardstick is imprecise and perhaps even unjust in particular cases. The Court seems to assume that the capacity to conceive a child and the judgment of the physician are the only constitutionally permissible yardsticks for determining whether a young woman can independently make the abortion decision. I doubt the accuracy of the Court's empirical judgment. Even if it were correct, however, as a matter of constitutional law I think a State has power to conclude otherwise and to select a chronological age as its standard.

In short, the State's interest in the welfare of its young citizens is sufficient, in my judgment, to support the parental-consent requirement. *Planned Parenthood* at 102-105.

Whether one agrees with every aspect of Justice Stevens' view, it is clearly a significant one, both as a statement of law and as a set of observations concerning fundamental assumptions of our social structure. The point for present purposes is that the District Court, without carefully considering the matter, rejected not only the controversial aspects of the statute's provisions (e.g., abrogation of the Commonwealth's limited mature minor rule), but also those aspects which Justice Stevens considered this Court to view as beyond peradventure (e.g., imposition of the parental consent requirement in the case of "immature minors" or minors "not capable of understanding the procedure and of appreciating its consequences. . ."). *Baird III* at 1001 (apparently but without citation alluding to the Court's discussion in *Planned Parenthood* at 75). Moreover, it suggested that its criticisms would be equally applicable to the second and third trimesters, periods which this Court's prior decisions have held amenable to state regulation. *Baird III* at 1001; *contra*, *Roe* v. *Wade*, 410 U.S. 113, 164 (1973). Appellants submit that the District Court's conclusions, totally out of harmony with rules announced in this Court's prior decisions and inconsistent with deeply embedded social traditions, present substantial federal questions which this Court should consider on the basis of full briefing and oral argument.

II. This Court Should Determine Whether The District Court Properly Entertained And Sustained Plaintiffs' "Facial Attack" On The Statute

In *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), this Court referred to a procedural facial attack[8] upon a state statute on

[8] The analysis which defendants suggested to the District Court as a means of distinguishing between plaintiffs' overbreadth claims and their substantive

overbreadth grounds and a resulting injunction against the statute's total enforcement as "strong medicine" which only the Court's particular solicitude for the First Amendment constitutional rights of absent persons justifies. *Broadrick* v. *Oklahoma*, *supra*, at 613. Passing for the purposes of this statement the obvious point that this is not a First Amendment case, appellants submit that this Court should consider whether the District Court could properly entertain a procedural facial attack and grant a broad, total injunction when, as the following analysis demonstrates, there was no need to do so.

Unlike the situation in the paradigm procedural facial attack, the plaintiffs before the District Court were those persons with arguable constitutional claims and the absentees were persons whom the statute quite properly included within its scope (e.g., minors in their second or third trimesters and minors incapable of giving informed consent). *Planned Parenthood* at 62; *Bellotti I* at 137-138.[9] At one point in its decision, the District Court seems to acknowledge this argument,[10]

complaints was to consider the former as procedural, i.e., criticisms which seek a determination that the statute is invalid not because its terms conflict with substantive constitutional requirements, but rather because it is, generally speaking, badly drafted. In contrast to these procedural facial attack claims, defendants suggested that plaintiffs were also making substantive complaints based upon notions of "undue burden" and insufficiently justified discrimination between consent requirements applicable to abortion surgery and consent requirements applicable to other types of health care services.

[9] *But see Baird III* at 1001.

[10] In discussing the statute's scope, the court stated, in disagreement with defendants' position, "[n]or do we agree with defendants that this is a case of parties seeking relief for overbreadth improperly affecting others, not before the court. *Cf. Young* v. *American Mini Theatres, Inc.*, 1976, 427 U.S. 50, 59 . . .; *Broadrick* v. *Oklahoma*, 1973, 413 U.S. 601 . . .. Plaintiffs are asserting defects in their own right." *Baird III* at 999.

but, at another, reverses itself.[11] Appellants contend that this obvious internal inconsistency in the District Court's analysis of the procedural facial attack issue presents a substantial question which warrants this Court's thorough examination. More fundamental, however, is the question whether, under the circumstances of this case and in this area of the law, the District Court should have entertained plaintiffs' procedural facial attack at all. When one considers that this Court's traditional justification for permitting procedural facial attacks in the First Amendment area has no applicability in this case, appellants submit that this Court should determine whether the District Court acted properly in entertaining and sustaining plaintiffs' facial claims.

III. This Court Should Consider Whether The District Court Failed To Base Its Decision Upon An Adequate Factual Record

The District Court tried this case on October 17 and 18, 1977. The purpose of this trial was to resolve disputed issues of material fact which the court determined existed when it denied plaintiffs' motion for summary judgment. One of the major areas of disputed fact to which defendants pointed in their opposition to plaintiffs' motion was the consent practices of Massachusetts health care providers who deliver services to

[11] Although no evidence was submitted concerning "immature minors" (i.e., those incapable of giving informed consent) and the District Court recognized the legitimacy of defendants' contention that plaintiffs had waived any claims they might have made concerning immature minors, it held both that the rights of immature minors were involved in the litigation (despite the fact that no immature minor was a party) and that the court felt justified in considering the statute's validity in the context of second and third trimester abortions (again, as to which no evidence was submitted and as to which no minor was a party). *Baird III* at 1001, 1000 n. 5.

adolescents and children. Appellants took the position in the District Court and would urge the same view in this Court that, in order to determine whether the statute imposes an "undue burden" or unjustifiably discriminates between abortion surgery and other health care services, one must have a standard of comparison or baseline against which to judge the statute's impact.[12] In order to determine for their own purposes the nature of these baseline data, defendants decided to conduct a survey of a representative sample of health care providers in the Commonwealth and to inquire about the consent requirements they impose over a wide range of procedures, patient age groups, and social situations. However, in order to accomplish their survey, defendants required the court's permission to contact members of the plaintiff health care provider class (represented by a physician). They filed a motion seeking leave to do so in early August, 1977, and the District Court denied the motion without opinion shortly thereafter.

The limited nature of the record before the District Court renders its decision subject to question. At times the court reaches factual conclusions on the basis of an admixture of evidence and speculation (see, e.g., its comments concerning parental behavior, *Baird III* at 1001); at other points, it combines a mistaken legal observation with an avoidance of a factual analysis which the defendants had requested it to permit them to undertake (see, e.g., the impact of the statute's abro-

[12] The factual information which would comprise this standard of comparison would, in appellants, view, be in the nature of "legislative fact." Recalling the Chief Justice's concurring comments in *Doe* v. *Bolton*, 410 U.S. 179, 208 (1973), however, appellants thought it best to establish as sound an evidentiary record as they could. They do not, of course, contest the District Court's decision to proceed to trial to determine contested issues of "legislative fact." Rather, they urge this Court to consider whether the District Court erred in preventing appellants from accumulating the factual information they thought relevant to the preparation of their defense and, as discussed in the text, basing significant portions of its decision upon an insubstantial record.

gation of the Commonwealth's limited mature minor rule, *Baird III* at 1003). And, of course, it seems to make observations if not conclusions about matters as to which the record contains no evidence at all (e.g., immature minors and second and third trimester situations, *Baird III* at 1001).

The fundamental problem of which the District Court's decision in this case is only symptomatic is the use of federal litigation as a means of making novel rules of substantive law. Appellants do not quarrel with the necessity or appropriateness of this aspect of the legal process, but they do suggest that it is a process which has run somewhat awry. *See generally* Miller and Barron, The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry, 61 Va. L. Rev. 1187, 1211-1218 (1975) (criticizing reliance upon data not subject to the adversary process); *Commonwealth* v. *King*, Mass. Adv. Sh. (1977) 2636, 2650, 372 N.E. 2d 196, 204-205 (1977) (Supreme Judicial Court refused to consider statistical information concerning discriminatory enforcement of prostitution laws against women which, although probative, was not introduced into evidence but merely included in appellate brief). In order to clarify the limits of reliance upon extra-record information, establish the proper allocation of evidentiary burdens in cases such as these, and correct what appellants submit are mistaken determinations based upon insufficient information, the Court should afford this case plenary consideration.

IV. This Court Should Consider The Appropriateness Of The District Court's Remedy

The District Court's final order, reproduced in the appendix to this statement (App. B), totally enjoined appellants from enforcing the statute. As a result, physicians and other health

care providers in Massachusetts are now entirely free, at least as a matter of civil and criminal statutory law, to perform abortions upon adolescents and children without parental consent no matter what the minor's age and regardless of her ability to comprehend the alternatives available to her. As the defendants pointed out to the District Court, pregnancies have been reported in children as young as five years old, and the incidence of pregnancies among children between the ages of ten and twelve is considerable. (See Defendants' First Set of Requests for Admissions to Plaintiff Gerald Zupnick, excerpted and reproduced in the appendix [App. D].) Moreover, as a result of the District Court's passing comments, attempts to require parental consent in second and third trimester cases would also seem doomed to the same fate which the current statute has met. See *Baird III* at 1001. Finally, even in those circumstances in which plaintiffs' own expert suggested that a parental consent requirement would be salubrious because it would prompt those adolescents who should discuss their pregnancy with their parents to do so (see the comments of Mr. Justice Stevens in *Planned Parenthood* at 104), the Commonwealth's effort to advance this interest has been enjoined.

The District Court's justification for its sweeping remedy appears to be a criticism of the Massachusetts Legislature's lack of careful draftsmanship. See *Baird III* at 999, 1005-1006. But such reasoning appears more suited to a context in which the concern is the imposition of penalties rather than the adjudication of a challenge to a state statute. In addition, such an unnecessarily broad remedy rebuffs the Legislature's and the Supreme Judicial Court's invitation to the District Court to assist the Commonwealth in striking the appropriate balance between the conflicting values[13] which legislation in

[13] The Legislature included an unusually fine severability clause in the statute, and the Supreme Judicial Court frankly declared its intention to construe the statute to satisfy constitutional requirements, both as it recognized them at the time of decision and as this Court might ultimately determine them. *Attorney General* at 100, 360 N.E. 2d at 291.

this area unavoidably implicates. It also flies in the face of the usual principles of equity which require injunctions to be narrowly drafted to meet only the specific remedial needs of the complaining parties. *Cf.* Developments in the Law — Injunctions, 78 Harv. L. Rev. 994, 1064-1067 (1965) (pointing out that specificity and narrowness are traditional criteria, discussing problems, and suggesting that broad injunctions are warranted in certain cases); *Warner & Co.* v. *Lilly & Co.*, 265 U.S. 526, 531 (1924) (Court narrowed scope of injunction). This Court should give this case plenary consideration in order to review the appropriateness of the remedy which the District Court fashioned.

V. This Court Should Determine Whether The District Court May Award Plaintiffs Their Litigation Costs "Lost Because Of Defendants' Mistaken Advocacy"

The District Court purports to have awarded plaintiffs their litigation costs incurred not only in the trial court but also in this Court in *Bellotti I* "lost because of defendants' mistaken advocacy." *Baird III* at 1006. This action troubles appellants for two reasons: first, it amounts to a reversal of this Court's prior determinations concerning costs related to *Bellotti I*, and, second and more importantly, it seems to be further evidence of the court's aversion to defendants' representational position and its refusal to recognize the legitimacy of the Commonwealth's efforts to enact constitutional legislation in an unsettled and highly controversial area. The suggestion that appellants, the Attorney General of the Commonwealth and

its district attorneys, should be punished for performing their constitutional duty and defending a state statute which one member of the District Court determined to be largely constitutional and at least four members of this Court have indicated has a strong claim to validity should be considered unacceptable. Since the District Court apparently thought otherwise, the issue is substantial and warrants this Court's plenary consideration.

Conclusion

For the reasons set forth above, the Court should note probable jurisdiction of appellants' appeal and set the case for argument.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General
GARRICK F. COLE
MICHAEL B. MEYER
THOMAS R. KILEY
Assistant Attorneys General
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1038

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Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS

v.

WILLIAM BAIRD, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Appendix to Jurisdictional Statement

FRANCIS X. BELLOTTI
Attorney General
GARRICK F. COLE
MICHAEL B. MEYER
THOMAS R. KILEY
Assistant Attorneys General
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1038
Attorneys for Appellants

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Appendix A.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM BAIRD; MARY MOE;
PARENTS AID SOCIETY, INC.;
GERALD ZUPNICK, M.D.; and all
others similarly situated,
Plaintiffs,

v.

FRANCIS X. BELLOTTI, Attorney General
of the Commonwealth of Massachusetts;
GARRETT BYRNE, District Attorney of the
County of Suffolk; the District Attorneys
for all other Counties, their agents, successors,
those acting in concert with them, and all others
similarly situated,
Defendants,

CIVIL ACTION
No. 74-4992-F

JANE HUNERWADEL,
Defendant-Intervenor.

Opinion.

May 2, 1978.

Before ALDRICH, *Senior Circuit Judge*, JULIAN, *Senior District Judge*, and FREEDMAN, *District Judge*.

ALDRICH, *Senior Circuit Judge*.

Introduction

This is the third time that this class action involving the constitutionality of a Massachusetts statute defining procedures that must be followed before a minor can obtain an abortion,[1] has required a full opinion.[2] It has been extensively prepared and briefed. Defendants[3] commence their most recent brief with this statement.

> "With the exception of the Watergate scandal and the Viet Nam war, no issue has divided the country and its

[1] The entire statute has been printed in other opinions. The section presently pertinent is Mass. G.L. c. 112, § 12S.

> "(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.
>
> "If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient."

[2] For our prior opinions enjoining the statute's operation, *see Baird* v. *Bellotti*, D.Mass. 1975, 393 F.Supp. 847, (*Baird I*,) *Baird* v. *Bellotti*, D.Mass., 1977, 428 F.Supp. 854, (*Baird II*.) *Baird I* contains many basic facts, including identification of the plaintiffs, standing, and justiciability, not repeated herein.

[3] Defendants are Francis X. Bellotti, Attorney General of the Commonwealth, and the District Attorneys of the several Massachusetts counties. Jane Hunerwadel, mother of minor daughters, was permitted to intervene as the representative of parents of Massachusetts minors who might wish to obtain abortions without parental knowledge or consent. In addition, we accepted Planned Parenthood League of Massachusetts, Crittenden Hastings Clinic, and Preterm, in a status something more than amici because of reservations about the adequacy of plaintiffs' representation.

> governmental officials more dramatically than the debate over the propriety of physicians' performing procedures to induce the termination of pregnancies, or as they are commonly referred to, abortions. The sparks of this controversy have fallen on all levels of government and flamed into judicial conflagrations involving additional and difficult issues of federalism, the legal process, and the relations among the state, the family, and the family's individual members."

Although we might question how far the Watergate scandal divided the country, and we are unaware of any body of judicial disagreements warranting the description of conflagrations, we agree with the rest of this statement. We do not construe it as an admonition directed to our personal conduct. However, we do accept it as a guide for ourselves in choosing the path we should tread. At the same time, we believe that the Massachusetts legislature should govern itself with the same understanding. When dealing with relatively unimportant and uncontroversial matters the state can paint with a broad brush. When entering an area of highly cherished rights and principles, where the sparks, to use defendants' word, are charged because of basic, conflicting and deeply held beliefs, the state should proceed with corresponding care. We do not find that it has done so. Nor do we agree with defendants that this is a case of parties seeking relief for overbreadth improperly affecting others, not before the court. *Cf. Young* v. *American Mini Theatres, Inc.*, 1976, 427 U.S. 50, 59; *Broadrick* v. *Oklahoma*, 1973, 413 U.S. 601. Plaintiffs are asserting defects in their own right.

The first question is what the statute means. Basically, it requires a minor under 18, unless married, widowed or divorced, who desires an abortion, to obtain the written consent

of both parents, unless available, and failing that, the approval of a judge of the superior court, upon a finding of "good cause." Although there are some additional questions, there were three principal areas of disagreement as to the more precise statutory meaning; the right of parents, in withholding consent, to consider interests other than the minor's, *i.e.*, their own, and that of the family as a whole (parents' rights); the power of the court to order an abortion without the parents' knowledge in appropriate instances (parents' bypass); the power of the court to override the informed consent of a mature minor (judicial override). At the original hearing defendants and all members of the court agreed that the statute recognized parents rights as well as the minor's, and forbade any parent bypass. Our dissenting brother felt, mistakenly, as it turned out, that the informed consent of a mature minor could not be overridden by the superior court. The court majority considered the statute unconstitutional in any event, and rejected his suggestion that we refer its meaning to the Massachusetts Supreme Judicial Court.

On appeal to the Supreme Court defendants changed their position in a number of respects. They abandoned parents' rights; they asserted that parents must regard only the minor's interests in considering whether to consent, and asserted, further, that the statute permitted court proceedings without the parents' knowledge if in the minor's best interests. Finally, they agreed with our dissenting brother that the statute recognized the mature minor rule and that there could be no judicial override in such event. The Supreme Court, without reaching the constitutional questions, but on the basis of the Massachusetts Attorney General's interpretation, which, it said, deserved special consideration, 428 U.S. at 143, stated that, so read, the Massachusetts statute might differ fundamentally from the Missouri statute struck down in *Planned Parenthood of Central Missouri* v. *Danforth*, 1976, 428 U.S. 52. Accordingly, it instructed us to refer the matter of construction to the Massachusetts court. *Bellotti* v. *Baird*, 1976, 428 U.S. 132.

Hypothesizing the interpretation that defendants urged upon it, the Surpeme Court said,

> "The picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from a statute that creates a 'parental veto.'" 428 U.S. at 145.[4]

In other words, the Court envisaged a mature minor rule, with no power in the superior court to override, and which permitted parents' bypass altogether if the court found an informed consent, and even as to an immature minor if the court found that an abortion without her parents' knowledge would be in her best interests.

Pursuant to our instructions, we certified nine questions to the Massachusetts court and, in the meantime, continued the stay of the statute's enforcement. *Baird II*. Thereafter we received our answers. *Baird* v. *Attorney General*, 1977 Mass.

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[4] In referring to *Baird* in *Maher* v. *Roe*, 1977, 432 U.S. 464, 473, the Court omitted part of the material in this paragraph. Defendants contend that by so doing the Court has limited the *Baird* decision and, consequently, the issues before us. We cannot think *Baird* was intended to be overruled or modified by an abbreviated summary, and we mention this point only because of the stress defendants lay upon it.

A. S. 96, 360 N.E.2d 288. The Massachusetts court there rejected the concept of parents' rights, holding the parents may consider only the minor's personal interests in deciding whether to consent. However, the court also construed the statute to be in some respects radically different from that envisaged by the Supreme Court. The court held that there could be no parents' bypass in any case. Further, it held that the statute eliminated abortions altogether from the mature minor rule. We address the constitutional issues raised by those holdings in that order.

1. *Parents' Bypass: The statute's absolute requirement of parental notification.*

The Massachusetts court determined that the legislature was "explicit in stating that a judge should pass on an application for a consent order only after one or both parents have declined to consent to the abortion." 360 N.E.2d at 294. Faced with the loss of this alleviating feature, defendants now take the position that there are not enough cases calling for an exception to mandatory consultations.[5]

Defendants commence with a number of mistaken assumptions. In the first place, they apparently misread the language of the Supreme Court's opinion, quoted ante, and think the Court was contemplating parents' bypass only when there was affirmative proof that this would be in the minor's best interests. We read the Court's language as indicating it understood defendants' contention to be that bypass would be

[5] Alternatively, defendants contend that "the proper decision would determine that the statute is valid on its face and leave for individual or aggregate 'as applied' litigation the resolution of problems affecting individual 'mature minors.'" We regard this argument as specious. Unless we act, the statute will have to be "applied" by the superior court as the Massachusetts court has held it is to be applied, *viz.*, by refusing to take jurisdiction until the parents have been notified.

in order in every case that the superior court found informed consent by a mature minor. The evidence warrants our findings that many, perhaps a large majority of 17-year olds are capable of informed consent, as are a not insubstantial number of 16-year olds, and some even younger.

In addition, the Court recognized that even if incapable of informed consent, it may be to a minor's best interest that the hearing be held, and the abortion be performed, without her parents' knowledge. The immature minor may be, in fact, the least capable of dealing with a hostile family situation. We reject defendants' singular contention that the issue of immature minors is not before us.[6]

Finally, in an apparent attempt to minimize the importance of the statute's defects, defendants' post-trial brief contains a graphic diagram prepared by counsel, divided into trimesters, and again subdivided, from which they conclude that plaintiffs' total complaint relates to only "one-twenty-fourth of the situations which the statute encompasses." Not only does this fractionalization disregard the points just made, but it overlooks the fact that a minor's possible need of an abortion without her parents' knowledge is not limited to the first trimester. However, even were the issues confined to the first trimester, the great majority of abortions occur in the earlier months. Defendants' giving equal numerical weight to each trimester is fanciful.

Coming to the merits, and passing for the moment the separate issue of mature minors, there are a variety of recognized reasons why it would be to a minor's best interests for

[6] Defendants also contend that plaintiffs waived the subject of immature minors. It is not clear that they did so, but, if they did, it was a breach of their duty as representatives of the classes that at least Dr. Zupnick purported to represent, and we are not bound thereby. It was for such reasons that we gave special stature to the parties we would ordinarily have considered only amici.

one or both of her parents to be kept in ignorance of her pregnancy. Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. Defendants concede, and the evidence shows, that an appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or on continuance of the pregnancy as punishment. We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court. This would seem but a normal reaction of persons who hold strong anti-abortion convictions.

The Massachusetts court conceded that there is no penalty for improperly withheld consent. From the parents' standpoint, the court was correct, but from the minor's manifestly it is not. We begin with the testimony of defendants' expert that a substantial number of minors would refuse to consult with their parents under any circumstances. Assuming, however, that they did consult and that the parents improperly refused to consent, the penalty borne by the minor — the burden of seeking a court order — is a heavy one. Plaintiffs' expert credibly and without contradiction testified that court proceedings over such a personal matter, even if conducted in the most benign manner, would be "severely detrimental to a teenager, particularly since she had just met with her parents' disapproval, which is difficult enough." Further, she credibly testified that many minors would not go to court, especially if it had to be against her parents, but rather would resort to illegal and frequently dangerous abortions. But assuming again in the statute's favor that the minor would initiate the proceedings, defendants' own expert expressed the opinion that if she did go to court and was successful, it would be likely

to destroy what was left of the family relationship.[7] The minor, accordingly, is in a no-win situation. If she loses the judicial proceedings, it will be a personal blow, and scarcely a redemption of the ill feeling and tension that undoubtedly resulted from her parents' refusal of consent and her taking them to court. If she wins, according to defendants' own expert she is likely to find herself in an even worse position.

On this basis plaintiffs contend with some persuasiveness that the entire concept of a court proceeding to remedy the unconstitutionality of the parental veto, as struck down in *Danforth*, is but an ignis fatuus, and itself imposes too great a burden upon the exercise of the minor's rights. We do not reach this issue, but we do hold that it is an improper burden in those cases where a court, if given free rein, would find that it was to the minor's best interests that one or both of her parents not be informed, but is forbidden by the statute to make this decision. In remanding the case to us the Supreme Court said,

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[7] "It seems to me that when affairs have reached this point where the relationship between the parents and the child have become a courtroom issue that I would have a lot of misgivings about the validity of the relationship between the parents and the child and how capable they are of being valid support for this child in the future.

. . . . . .

"The consequences, if the decision was made in favor of the child, for quality family relationships are not good. The need for support on the part of the child would be abandoned at this point and the child would be abandoned at this point and her need for support would be great . . . ."

This last sentence may have been inartistically expressed, or inaccurately transcribed, but, however it was said, we reject defendants' contention that their witness made "clear it is not judicial intervention but rather the underlying family crisis which prompts his dim prognosis." To the contrary, it is apparent that he felt a judicial proceeding, particularly if successful, might be the final blow.

> "We do not accept appellees' assertion that the Supreme Judicial Court of Massachusetts inevitably will interpret the statute as to . . . require the superior court to act other than in the best interests of the minor . . . ." 428 U.S. at 147.

However, in reading the statute as requiring parental notification in every instance, the Massachusetts court has done precisely that.

Defendants would answer this by claiming that this defect is not "real and substantial," *Young* v. *American Mini Theatres, Inc.*, ante, 427 U.S. at 60, or "substantial . . . in relation to the statute's plainly legitimate sweep," *Broadrick* v. *Oklahoma*, ante, 413 U.S. at 615. However, in another connection, but equally applicable here, their brief refers to "legislative recognition of the unfortunate fact that parents are not always supportive of their pregnant daughters and may, the evidence suggests infrequently, refuse to consent to the performance of abortion surgery although the surgery is in their child's best interests, or mistreat her in other ways." If there is legislative recognition of this unfortunate fact in one connection, there is no reason why there should not be in another. In terms of the direct concern of this statute, the exact number of minors who are injured is unimportant. Particularly is this so when there is no practical reason for not protecting them. Practicality, in some cases, may justify overbreadth, but since, under the Massachusetts court's holding, the superior court in any event must determine the minor's best interests in the light of all her personal circumstances, it opens no new areas to inquire into her family situation.

We add that it is peculiarly incorrect, and inappropriate, for defendants to express alarm by saying that "plaintiffs' overbreadth claim is an unwarranted use of an engine of destruction whose acceptance would destroy the entire statute." If the statute is overbroad because it fails to protect the interests which are its sole justification, there is a simple solution — the legislature can remedy the defect.

We cannot leave this matter without commenting briefly on the superlatives that intervenor Hunerwadel attached to the value of requiring parental notification in order to obtain parental support, and to permit parental guidance. We in no way minimize the importance of these matters.[8] Parents have many years, however, to offer guidance, and to indicate support. However surprised an individual parent may be to find a daughter pregnant, given the present high incidence of teenage pregnancy the possibility seems too great for concerned parents to disregard until it happens. If the family relationship is such that communication has not been attempted, or successful, before the pregnancy, we agree with the expert who doubted the efficacy of a last-minute, state-compelled consultation. What is more important, if the minor, too, doubts it, a statute that requires her to go to her parents as a precondition to going to court will not tie her hands. Rather, it will lead her to the illegal abortionists that defendants rightly decry, or to other dangerous activity. The minor may, of course, be mistaken, but we do not believe the answer to this is a judicial proceeding preconditioned on her finding out, for the die has then been cast.

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[8] We also note that Justice White's opinion in *Danforth* referred to parental consent as "the traditional way by which States have sought to protect children from their own immature and improvident decisions." 428 U.S. at 95. The Justice was speaking, however, in terms of a statute under which parents made the final decision. Where there is to be a judicial determination, it would be counter-productive to include the parents when the court finds that their knowledge and presence would be detrimental.

2. *Judicial Override: The mature minor and unequal protection.*

Not only under this statute must every minor, irrespective of her achievement of maturity sufficient to reach an informed consent, notify her parents and seek their consent before going to court, but she must submit to the court's decision if it does not conform to her own. Defendants represented to the Supreme Court that Massachusetts recognized the mature minor rule and that if the court found an informed consent, it would proceed to issue the order. The Massachusetts court held that defendants had misread the statute; that Massachusetts did have the mature minor rule, but that the statute rejected it with respect to abortions. It went on to state that, but for the statute, the mature minor rule would permit an informed consent "where the best interests of a minor will be served by not notifying . . . her parents." 360 N.E.2d at 296. Thus the statute not only requires the parents to be notified, but deprives the minor of the right to decide even when the court has found her mature and that her decision was informed. Instead, the state, acting through the judge, substitutes its own view. It does so even in light of the testimony, which we credit, that in addition to the loss of her rights, it is a highly traumatic experience for a mature minor to be refused a desired abortion.

A minor has a basic constitutional right to an abortion. *Roe* v. *Wade*, ante; *Carey* v. *Population Services International*, 1977, 431 U.S. 678, 692-94; *Planned Parenthood of Central Missouri* v. *Danforth*, ante, 428 U.S. at 74-75. The state's power to limit this right should extend only to protect the minor from the special consequences of her minority — immaturity, and the lack of informed understanding. Instead, the statute imposes upon the minor the very disability which has been found not to exist, and does so uniquely in the area in which the Court has determined she has constitutional rights.

An account of the Massachusetts law as to mature minors is fully set forth in the opinion of the Massachusetts court, and need not be repeated. Except for sterilization, a far more serious and far-reaching procedure, abortion is the only form of surgery to which a mature minor may not consent, although the evidence shows that many other forms are far more complicated and dangerous. Defendants, in dwelling upon the dangers of abortion, proceed as if the only issue were to abort or not to abort, neglecting the fact that the choice necessarily involves a further alternative. The evidence fully supports the conclusion stated in *Roe* v. *Wade*, ante, 410 U.S. at 149, that continued pregnancy and child-birth involve greater risks than a properly performed first trimester abortion. Nor are we speaking only as to physical dangers. The same comparative findings with respect to abortion as against continued pregnancy apply to the psychological risks as to the physical. We find no reasonable basis for Massachusetts distinguishing between a minor and an adult, given a finding of maturity and informed consent.[9] Even the Massachusetts court stated that this is an area particularly appropriate for the mature minor rule. 360 N.E.2d at 296. We regard the legislative exception to be both an undue burden in the due process sense, and a discriminatory denial of equal protection.

3. *Formal overbreadth.*

Not only has the statute, with the exception of parents' rights, been found to possess none of the features which defendants persuaded the Court might distinguish it from the Missouri statute condemned in *Danforth*, but we believe it improperly suggests the existence of parents' rights. Defendants,

[9] Nor, parenthetically, has any reason been advanced for attaching to abortion the special requirement of dual consent by both parents. Rather, this provision seems a further manifestation of our originally found intent to recognize parents' rights.

realizing that extending rights to parents that may conflict with a minor's own interest was improper under *Roe* v. *Wade*, abandoned the position that the statute recognized them in their arguments before the Supreme Court and the Massachusetts court, and the latter, pursuant to the need to construe the statute constitutionally, accepted that construction. We agree with our dissenting brother that, generally, a limiting construction of an otherwise unconstitutional state statute by a state court is read into the statute, and can save it, if the construction itself is constitutional. In this case, however, involving as it does a most sensitive area, where the statute will be read, and applied, primarily by laymen, we think that a limiting judicial construction is insufficient to cure the impermissible chill which its excessively broad language creates. It is only reasonable to anticipate that many parents, accustomed to think in terms of parents' rights, will find them included for the very reasons originally argued by the defendants and accepted by us. Clearly they will do so if they are unaware of the limitations which the court read into the statute. We do not share our brother's optimism that every parent who knows of the statute will be equally cognizant of the court's interpretation. Such knowledge is a legal presumption, not a factual one. Moreover, it is likely that some, even if aware of the court's opinion, will choose the language of the legislature over judicial limitations they regard as an unwarranted usurpation. We may take judicial notice, from public reaction we have seen to *Roe* v. *Wade*, that an appreciable segment of the public holds such views.

In light of the very heavy burden that the statutorily required judicial proceeding imposes upon a minor, we regard it essential that the limited scope of the issue confronting parents, when considering whether to consent, be brought home as forcefully, and precisely, as possible, to minimize the incidence of improper refusals. Since there is no justification

for the statute's failure to do this, the shadow it casts is an undue burden upon the minor's rights. *See Maher* v. *Roe*, ante, 432 U.S. at 473; *Bellotti* v. *Baird*, ante, 428 U.S. at 147. Arguably, it is a welcomed shadow. Whatever may have been the legislature's original intent, we observe that it reenacted the statute, without amendment, in 1977 Mass. Acts ch. 397, not only after the Supreme Court had indicated what might pass constitutional muster, but after the Massachusetts court had disclosed this apparent overbreadth, and we had commented, in *Baird II*, on its chilling effect. The statute is a prominent public issue, and we cannot think the legislature was unaware of its judicial course. Under these circumstances it may be thought that the legislature prefers the chilling effect rather than to have the statute expressed in "terms that the ordinary person exercising ordinary common sense can sufficiently understand." *United States Civil Service Commission* v. *National Ass'n of Letter Carriers*, 1973, 413 U.S. 548, 569. This, in turn, evokes the statement of the Court in *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 1977, 429 U.S. 252, 265-66, "When there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified." This response seems particularly warranted when the overbreadth serves no other purpose.

Judicial Repair.

The Massachusetts court, although recognizing that its function was to construe the statute and not to determine its constitutionality, did read a substantial limitation into a portion of the language in an effort to make the parental consent provision constitutional. The court did not, however, read into the statute the exceptions the Supreme Court had indi-

cated would make a fundamental difference and might save it from constitutional infirmity. Instead, in these respects it read the statute the other way, but purported to give it a chameleon-like ability to adjust to whatever color should ultimately be necessary to protect it. While saying that the statute "is explicit in stating that a judge should pass on an application . . . only after one or both parents have declined to consent," 360 N.E.2d at 294, nonetheless this requirement is subject to alteration.

> "If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation." *Id.* at 292.
>
> . . . . . .
>
> "[The statute] must be construed to require as much parental consultation as is permissible constitutionally. In such a situation, the judge will have to determine whether circumstances exist which make prior parental consultation impermissible constitutionally." *Id.* at 294-95.

How the judge is to have the opportunity to make such a determination, much less how a minor seeking an order will know he can do so, in the face of explicit language saying he cannot, the court did not explain.

Again, the court said,

> "The Legislature has left no room to apply a mature minor rule where an unmarried minor seeks an abortion without parental consultation." *Id.* at 294.

However, this, too, can be changed, "[if] a contrary conclusion is compelled constitutionally." *Id.* at 293.

This perceived adaptability presents a number of problems. It is commonly said that a statute is to be given a constitutional construction "if fairly possible," *Crowell* v. *Benson*, 1932, 285 U.S. 22, 62, "when a limiting construction . . . could be placed," *Broadrick* v. *Oklahoma*, ante, 413 U.S. at 613. Here something more is involved than construing language. The Massachusetts court, in addition to contradicting its specific terms, suggests reading into the statute affirmative provisions made out of nothing but a generally announced purpose to pass constitutional muster.[10] In so doing, the court seems to have found the ultimate remedy for all constitutional infirmities. If a statute which, in terms, requires parental consultation without exception, can be "construed to require as much parental consultation as is permissible constitutionally," here, at once, is an instant cure, both for overbreadth, and for lack of standards. Regardless of whether a statute says too much, or too little, so long as the legislature intended it to be constitutional, when it comes before a court it will be appropriately rewritten. With due respect, we cannot believe this to be possible. *Cf. United States* v. *Reese*, 1875, 92 U.S. 214, 221.

The situation is even more undesirable. Although the statute is not ours, the Massachusetts court has, in effect, given us the coloring-book. The Supreme Court remanded the case for construction by the Massachusetts court because "in the absence of an authoritative construction, it is impossible to define precisely the constitutional question presented." 428 U.S. at 148. Now, apparently, the question supplies the answers. This is an approach which, so far as we can ascertain, is

[10] Although the Massachusetts court, and the defendants, speak of severability, such action is not severance. Severability is a process of striking out, not of insertion or rewriting. *See United States* v. *Reese*, 1875, 92 U.S. 214, 221.

unique. While it is ultimately, of course, for the Supreme Court, we must doubt our authority to fix terms of a state statute contrary to the prima facie interpretation given it by the state court. *See United States* v. *Thirty-seven Photographs*, 1971, 402 U.S. 363, 369.

We reaffirm our decision that the statute is unconstitutional and is to be permanently enjoined. Plaintiffs are entitled to costs, including recovery of costs paid as a result of the previous appeal, lost because of defendants' mistaken advocacy.

BAILEY ALDRICH,
U.S. Circuit Judge.

FRANK H. FREEDMAN,
U.S. District Judge.

JULIAN, Senior District Judge (dissenting):

After the first trial the majority of this three-judge court held Mass. G.L. c. 112, § 12P unconstitutional because of its requirement of parental consent to a minor's abortion and permanently enjoined the defendants from enforcing it "in any fashion."

I dissented. The majority and dissenting opinions are reported in 393 F.Supp. 847, at pages 849 and 857 respectively.

The defendants appealed. The Supreme Court vacated the judgment of the District Court and remanded the cases[1] for proceedings consistent with the Supreme Court's opinion holding that the District Court should have certified to the Supreme Judicial Court of Massachusetts (hereinafter SJC) appropriate questions concerning the meaning of section 12P and the procedure it imposes.

[1] *Bellotti* v. *Baird*, No. 75-73, together with the companion case, *Hunerwadel* v. *Baird*, No. 75-109; 428 U.S. 132 (1976).

The District Court accordingly certified nine questions to the SJC which, after hearing arguments of counsel, answered all nine questions in an opinion filed January 25, 1977. *Baird* v. *Attorney General*, ____ Mass. ____, 360 N.E.2d 288.

This District Court thereafter held further hearings and received additional evidence, arguments and briefs in the case.

The District Court remains divided on the issue of the constitutionality of the statute as construed by the SJC in its answers to this Court's questions. The same two judges who had invalidated the statute have now reaffirmed their original decision and have held that section 12P (now section 12S) even as construed by the SJC is unconstitutional and ordered that enforcement of the statute be permanently enjoined.

I again dissent from their decision. I would hold the statute constitutionally valid except that part which as construed by the SJC in its answer to question 2(b) vests in the superior court judge the power to withhold consent to the abortion even though he finds that the minor "is capable of making, and has made, an informed and reasonable decision to have an abortion" but further "determines that the best interests of the minor will not be served by an abortion." *Id.*, at 293.

In 1974 the Massachusetts Legislature adopted Stat. 1974, c. 706, entitled, "An Act to protect unborn children and maternal health within present constitutional limits." Section 12P of that Act reads as follows:

> "(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a

hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient."

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section 12R."

The nine questions certified to the SJC and its answers are as follows:

"1. What standards, if any, does the statute establish for a parent to apply when considering whether or not to grant consent?

"a) Is the parent to consider 'exclusively . . . what will serve the child's best interest'?

"b) If the parent is not limited to considering exclusively the minor's best interests, can the parent take into consideration the 'long-term consequences to the family and her parents' marriage relationship'?

"c) Other?"

The SJC gave this answer (360 N.E.2d at p. 292):

"This question concerns the standard which should be applied by a parent in deciding whether to consent to an abortion for his or her unmarried daughter. The statute provides no explicit standard. . . . In light of the Court's opinion in *Planned Parenthood of Cent. Mo.* v. *Danforth* [428 U.S. 52 (1976)] abrogating an absolute parental veto, we construe § 12P so as to avoid any constitutional question, as far as possible, and answer that the parent is to consider 'exclusively . . . what will serve the child's best interest.' We thus answer question 1(a) in the affirmative and need not answer questions 1(b) and 1(c)."

"2. What standard or standards is the superior court to apply?

"a) Is the superior court to disregard all parental objections that are not based exclusively on what would serve the minor's best interests?

"b) If the superior court finds that the minor is capable, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision is a better one?

"c) Other?"

The SJC answered as follows (360 N.E.2d at page 293):

"Section 12P provides that if one or both of the minor's parents refuse consent, 'consent may be obtained by order of a judge of the superior court for good cause shown . . . .' Here there is a statutory standard of 'good

cause.' The second question inquires concerning the role of the judge in applying the 'good cause' standard. We think it clear, answering question 2(a), that the same considerations referred to in answering question 1 must be applied by a judge of the Superior Court. He must disregard all parental objections, and other considerations, which are not based exclusively on what would serve the minor's best interests. . . . '[G]ood cause' means that the judge may give consent to an abortion where it is shown that, in spite of the disapproval of one or both parents, the best interests of the minor will be served if the abortion is performed. In granting consent, the judge, of course, may impose reasonable conditions which will protect those best interests."

Answering question 2(b), the SJC stated:

"Unless a contrary conclusion is compelled constitutionally, we do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge must make a determination of those circumstances, but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him. We suspect that the judge will give great weight to the minor's determination, if informed and reasonable, but in circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact."

"3. Does Massachusetts law permit a minor (a) 'capable of giving informed consent,' or (b) 'incapable of giving informed consent,' 'to obtain [a court] order without parental consultation'?"

The SJC answered (360 N.E.2d at 296) that

"parental consultation for an abortion is required by statute in all cases, other than in an emergency or where there is no parent (or the equivalent) available."

"4. If the court answers any of question 3 in the affirmative, may the superior court, for good cause shown, enter an order authorizing an abortion, (a), without prior notification to the parents, and (b), without subsequent notification?"

The SJC answered (360 N.E.2d at 297) that

"if they are available, the parents of a minor must be notified of any proceeding brought by her to obtain judicial consent to an abortion and will be entitled to participate . . . . We say that, apart from constitutional restraints, notification to the parents of the judicial proceeding, in advance if possible, is required, and thus we answer question 4 in the negative. We recognize that there may be instances in which the parents are unavailable and the judge must act. In such a case, consultation is impossible, but subsequent notification of the proceeding may not be. Unless barred by constitutional considerations, notification of a minor's parents concerning judicial proceedings is required."

"5. Will the Supreme Judicial Court prescribe a set of procedures to implement c. 112, § 12P which will expedite the application, hearing, and decision phases of the superior court proceeding provided thereunder? Appeal?"

The SJC answers the first portion of question 5 in the affirmative (360 N.E.2d at pp. 297-298):

> "Prompt resolution of a § 12P proceeding may be expected. On any court day, hardly any person in the Commonwealth [of Mass.] is more than one or two hours' travel from a court house where a Superior Court judge is available to process an application under § 12P. The proceeding need not be brought in the minor's name and steps may be taken, by impoundment or otherwise, to preserve confidentiality as to the minor and her parents."

The SJC details the procedures available to expedite the proceedings:

> "At each stage, a record of the proceedings will be preserved."

With reference to the second portion of question 5, which concerns the prospect of expeditious appeals, the SJC states that it had

> "no question concerning the speedy disposition of any appeal."

"6. To what degree do the standards and procedures set forth in c. 112, § 12F (Stat. 1975, c. 564), authorizing minors to give consent to medical and dental care in specified circumstances, parallel the grounds and procedures for showing good cause under c. 112, § 12P?"

The SJC answered as follows (360 N.E.2d at p. 300):

> "The grounds for consenting to an abortion under § 12P, which we have defined as the best interests of the minor, are not different from the standards to be applied in determining whether some other medical procedure should be performed on a minor pursuant to § 12F. In each instance, a physician must exercise his or her medical judgment and the minor must consent to the procedure as being in his or her best interests. The difference between § 12P, concerning an abortion, and § 12F, concerning other medical operations, lies in the procedures which must be followed in arriving at the conclusion that the particular operation will be in the best interests of the minor. Under § 12F, a married, widowed, or divorced minor may consent to any and all medical services without the intervention of either his or her parents or of a court. Thus, the requirements of § 12P concerning parental or judicial approval of an abortion are inapplicable to such minors. All other minors described in § 12F seeking abortions must pursue the procedures of § 12P, although they are free to consent to any other medical procedure (except sterilization) without the involvement of their parents or of a judge. Minors not described in § 12F have only their common law rights to consent to medical services, except as expanded or limited by statute."

"7. May a minor, upon a showing of indigency, have court-appointed counsel?"

The SJC answered this question as follows (360 N.E.2d at p. 301):

> "If a judge of the Superior Court determines that the best interest of an indigent minor would be served by the appointment of counsel to represent the minor, the court has the power to appoint counsel for the minor to assist her in the assertion of her constitutional rights. . . . If the mere existence of the 'burden' of seeking judicial consent to an abortion is not unconstitutionally onerous (and apparently these plaintiffs have not yet so claimed in the District Court), the circumstances that an indigent minor may have counsel appointed for her lightens the 'burden' and tends to make the requirement more acceptable constitutionally. . . . In order to avoid a constitutional question concerning the burden on the assertion of a minor's constitutional rights which would arise from a contrary interpretation, we construe the statutes of the Commonwealth to authorize the appointment of counsel of a guardian ad litem for an indigent minor at public expense, if necessary, if the judge, in his discretion, concludes that the best interests of the minor would be served by such an appointment."

"8. Is it a defense to his criminal prosecution, if a physician performs an abortion solely with the minor's own, valid, consent, that he reasonably, and in good

faith, though erroneously, believed that she was eighteen or more years old or had been married?"[2]

The SJC answered question 8 in the affirmative (*id.*, at p. 302):

> "The fifth paragraph of § 12F . . . provides such a protection to a physician. Although § 12F is not concerned primarily with abortion procedures, the Legislature did not except abortions from the broad grant of protection of the fifth paragraph of that section, as it did exempt abortions from certain other provisions of § 12F. . . . A construction of § 12F which would not extend to physicians performing abortions the same protection extended to physicians performing other operations would raise a constitutional question which we avoid by the construction of § 12F which we have adopted."

"9. Will the Court make any other comments about the statute which, in its opinion, might assist us in determining whether it infringes the United States Constitution?"

The SJC points out that Rule 3:21 of that Court, which sets forth the certification procedure, "contemplates that only questions of law will be certified. Question 9 is not a question of law." The SJC, however, takes the opportunity under question 9 to comment on "the consequences of a determina-

[2] The SJC commented (n. 21, *id.*, at p. 302):

> "The word 'valid' may not be an appropriate one in the context of the question."

tion that the differing procedures of § 12P and § 12F, as interpreted by us apart from the impact of constitutional considerations, do not survive an equal protection of the laws challenge." *Id.*, pp. 302, 303.

It is clear that the statute as construed by the SJC is designed to assure parental, and, if necessary, judicial involvement in the pregnant minor's decision to have an abortion. The magnitude, seriousness, and urgency of the problem of teenage pregnancy and its consequences are generally acknowledged.[3] The Massachusetts Legislature had the power within the con-

[3] "Adolescents in the United States have rates of childbearing that are among the world's highest." From plaintiffs' Exh. 2 ("11 Million Teenagers") at page 7.

> "There are about 21 million young people in the United States between the ages of 15 and 19 years. Of these, more than half — some 11 million — are estimated to have had sexual intercourse — almost seven million young men, and four million young women. In addition, one-fifth of the eight million 13- and 14-year-old boys and girls are believed to have had intercourse." *Id.*, at page 9.

> "Each year, more than one million 15-19-year-olds become pregnant, one-tenth of all women in this age group. (Two-thirds of these pregnancies are conceived out of wedlock.) In addition, some 30,000 girls younger than 15 get pregnant annually. . . . Of the additional 30,000 pregnancies experienced by girls younger than 15, 45 percent were terminated by abortion . . . ." *Id.*, at page 10.

As of June 1976 there were approximately the following numbers of female adolescents residing in Massachusetts by age:

Ages 10, 11 and 12	166,500
Ages 13 and 14	113,500
Ages 15, 16 and 17	174,000
TOTAL	454,000

(Derived from answer to defendants' Request for Admission No. 1 under Rule 36, F.R.Civ.P.)

stitutional limits to enact legislation it reasonably believed would tend to alleviate the problem in Massachusetts.

The majority rely on three arguments to hold the statute unconstitutional in its entirety. One of these arguments is that the statute's failure to inform parents that they must consider only the best interests of the minor in deciding whether to consent to their daughter's abortion constitutes a heavy burden on the exercise of her right to have an abortion because she would have to go to court in case of "an improper refusal of consent."[4]

[4] The majority are of the opinion that an improper parental refusal will impose on the minor the burden of going to court or the burden of seeking alternatives to a legitimate abortion. With regard to minors seeking alternatives to a legitimate abortion, the plaintiffs' witness admitted that it is impossible to have data on that. (Oct. 18, 1977, Tr. at 106.) The majority accept plaintiffs' testimony that court proceedings would be severely detrimental to a teenager although the plaintiffs' expert admitted that she had never been to court with any of her minor patients and that she had been involved in fewer than five courtroom proceedings of any fashion. (Oct. 18, 1977, Tr. at pp. 100, 101.) A court appearance in this case was apparently not viewed as burdensome to Mary Moe I, the only minor who appeared before the court, since she "voluntarily participated" in the action. *Baird* v. *Bellotti*, 393 F.Supp. 847, 850, n. 5.

The majority opinion contains this statement (p. 8): "We begin with the testimony of defendants' expert that a substantial number of minors would refuse to consult with their parents under any circumstances." The defendants' expert's testimony, however, was as follows (Oct. 18, 1977, Tr. at 148):

> "Q. How about a pregnant adolescent? Do you have an opinion as to the extent to which a pregnant adolescent would be reluctant to discuss the matter of that pregnancy with her parents?
> "A. I don't know what it is you are trying to get me to say. I would qualify your question by saying that at first contact adolescent girls are reluctant to discuss it with their parents.
> "Q. Is it fair to say that with careful counselling a great number of those would then discuss it with their parents?
> "A. Yes.
> "Q. But there would still be a substantial number who would be reluctant to do so?
> "A. Yes, sir."

Parents, however, are not without notice of the standard to apply in deciding whether to consent to their daughter's abortion. The SJC's construction of the statute explicitly sets out the standard to be used: "the parent is to consider 'exclusively . . . what will serve the child's best interest.'" *Baird* v. *Attorney General*, 360 N.E.2d 288, 292 (1977). A construction by the state's highest court fixes the meaning of the statute. The "state interpretation is as though written into the ordinance itself," *Poulos* v. *New Hampshire*, 345 U.S. 395, 402 (1953); it "puts these words in the statute as definitely as if it had been so amended by the legislature." *Winters* v. *New York*, 333 U.S. 507, 514 (1948). See *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432 (1963); *Commonwealth* v. *Richards*, ___ Mass. ___, 340 N.E.2d 892, 894 (1976). A state court construction of a statute is notice to all concerned of what the statute provides. See *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973) (by implication).

The majority anticipate that many parents will mistakenly find parents' rights included in the language of the statute, but

Although the Supreme Court in *Bellotti* v. *Baird* did not reach the issue of whether a court hearing would be an impermissible burden on a minor's rights, of the five justices who held the parental consent requirements unconstitutional in *Planned Parenthood*, *infra*, two indicated that they would approve of a statute which contained provisions for a court proceeding. "[A] materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest." *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., with Powell, J.).

This court has already ruled that for purposes of this facial attack the question of burdensome court procedures is a non-issue. "[W]e rule now that we will conclusively assume, for the purposes of our decision, utmost speed, diligence, and proper procedure and consideration, including protection of privacy by the Superior Court and an Appellate Court." (Apr. 13, 1977, Hearing Tr. at p. 3.)

they give no reason for assuming that many parents will be familiar with the language of the statute and not assuming the same familiarity with the SJC's construction of the statute. If we are to assume that many parents are sufficiently informed to have knowledge of the exact language of the statute, it is reasonable to assume that they would also be informed of the statute's construction.[5] In any case, the construction of the statute is now part of the law and it is a general rule of law that all persons are presumed to have notice of all that the law contains. The statute as construed unequivocally states that parents are to consider only the minor's best interests. It is hard to imagine how this could be stated more clearly.

The majority attribute to the Legislature the deliberate intent to make the statutory language imprecise because the 1977 re-enactment of the statute failed to spell out the standard for parental consent defined by the SJC. This argument appears to be wholly without merit. The purpose of the 1977 re-enactment was to make corrective changes in the numbering of the sections of the statute. At the same time of the original enactment of the statute on abortion, there were already in existence statutory sections with the same numbering as the abortion sections. See *Bellotti* v. *Baird*, 428 U.S. 132, 134, n. 1. In 1977 the Legislature merely corrected this duplication by enacting the statute with different numerical designations. No changes in substance were made. In view of the purpose of the re-enactment, the majority finding that the Legislature "welcomed" imprecision is inaccurate. In fact, if any intention regarding the meaning of the statute is to be attributed to the Legislature's re-enactment, it must be that the Legislature intended the judicial construction to be part of the statute. "It is a well settled rule of statutory interpretation

[5] On vital issues, such as those relating to abortion and adolescents, decisions of the SJC have substantially the same dissemination and publicity as legislative enactments.

that, when a statute after having been construed by the courts is re-enacted without material change, the Legislature are presumed to have adopted the judicial construction put upon it." *Nichols* v. *Vaughan*, 217 Mass. 548, 551 (1914); *Commonwealth* v. *Benoit*, 346 Mass. 294, 297 (1963); *Lorillard* v. *Pons*, 46 U.S.L.W. 4150, 4151 (U.S. Feb. 22, 1978). Thus, the statute contains legally sufficient notice that parents are to consider only the best interests of their child.

Another reason relied upon by the majority in holding the statute unconstitutional is that the statute has an absolute requirement of parental notification and that there are reasons why it could be in a minor's best interests for her parents to be kept in ignorance of her pregnancy. The majority found that the exact number of minors who are injured by this requirement is unimportant. However, the evidence does indicate that the cases where parental notification may not be in a minor's best interests are exceptional and of rare occurrence.[6] Plaintiffs' expert estimated that in her practice parental consultation is "objectively contraindicated"[7] only about 5 to 10 percent of the time. (Oct. 18, 1977, Tr at p. 103; Deposition of Dr. Nadelson at I-41.) Another plaintiffs' experts, commenting on how "extremely important" parental involvement is, noted that "there is the *rare* case where it is impossible to

[6] In their opinion the majority point out that the defendants concede that an appreciable number of parents are not supportive and that these include parents who would inflict physical harm, insist on an undesired marriage or continuance of pregnancy as punishment. This impression of parental behavior which the majority creates fails to note the limitation in the concession made by the defendants. Defendants stated that an "appreciable number" means only that such parents exist. The defendants made no admission as to the frequency of occurrence of this phenomenon. (Defendants' Responses to Plaintiffs' Requests for Admission, ¶ 7.)

[7] "Objectively contraindicated" was used by the witness to mean that the witness, as a doctor, would agree that parental consultation is contraindicated. (Oct. 18, 1977, Tr. at 102.)

obtain." (Dec. 7, 1974, Tr. at 67.) (Emphasis added.) The "usual situation" is that the minor's fears of telling her parents are not realized, and if the minor's fears were taken at face value and her parents not involved, she and her family would have lost the benefit of parental involvement. (Dec. 30, 1974, Tr. at 77, 123.) The majority in the case at bar assumed in their first opinion that most parents would seek to be supportive of their minor daughters. 393 F.Supp. 847, 853 (D. Mass. 1975). The evidence shows that in the great majority of cases parental involvement will be in the minor's best interest. The statute should be "judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Califano* v. *Jobst*, 46 U.S.L.W. 4004, 4007 (U.S. Nov. 8, 1977). In this case, according to plaintiffs' own testimony, the typical, "run of the mill" situation is that a minor's fears about involving her parents are not realized. (Dec. 30, 1974, Tr. at 77.) Since in the majority of cases the statute will operate to protect minors from the consequences of decisions which they are not capable of making alone,[8] an imputation of unsupportive parental behavior in a concededly small number of cases[9] should not be held to out-

[8] Plaintiffs admit that: the abortion decision-making process is the most difficult aspect of the experience for the girl (Plaintiffs' Responses to Defendants' Requests for Admissions, ¶ 67); an adolescent lacks experience with her feelings and does not have the emotional control of an adult (*id.*, ¶ 53); ambivalence is especially prominent among adolescents (*id.*, ¶ 58); a period of intense anxiety and ambivalence is often experienced in the twenty-four hours prior to an abortion (*id.*, ¶ 57); a pregnant adolescent is " a child potentially bearing a child" (*id.*, ¶ 59); and the girl who makes her decision in collaboration with her parents seems the best prepared (*id.*, ¶ 67).

[9] In note 5 of their opinion the majority reject the defendants' argument that in those exceptional cases where parental involvement may not be in the minor's best interests, an "as applied" proceeding would be the proper method to resolve the problem. In my view the defendants' argument is valid. This court would have jurisdiction over questions of the constitutional

weigh the beneficial effects provided by the statute for the majority of minors.

The majority also express doubt of the "efficacy" of "last minute" parental consultation, reasoning that parents have many years to guide their children, and if communication has not been established before pregnancy, "last minute" consultation will not be beneficial. This reasoning is not persuasive. Does the majority perhaps attribute greater efficacy to a "last minute" consultation at an abortion facility, such as occurred in the case at bar?[10] Is it not far more likely that the

permissibility of specific applications of the statute and in "as applied" proceedings could determine whether the statutory requirement of parental involvement is constitutionally permissible. In such proceedings the court would have concrete facts before it and the benefit of arguments of counsel to enable it to focus on the problem.

[10] December 31, 1974, Testimony of Mary Moe I:

"Q. (by MR. LUCAS) When did you first contact Parents Aid Society?

"A. About five minutes after I found out I was pregnant.

"Q. And do you recall with whom you talked?

"A. To Marilyn.

"Q. About how long?

"A. About ten minutes.

"Q. Did you make an appointment at that time?

"A. Yes, I did.

"Q. Did she promise they would do an abortion on you at that time?

"A. Yes, she did.

"Q. Did she tell you you would have to have counseling first?

"A. She explained the whole thing to me on the phone. They also explained at the Women's Health Clinic. They had counseling and different things like that. She explained that I would go to counseling and they would perform the abortion, and it would take about five minutes, and I would go in the recovery room. She just briefly described it and when I came in, you know, they would go into more detail.

"Q. Did she tell you you would see a doctor at any time?

"A. Yes, Dr. Zupnick, who performed the abortion.

pregnant adolescent would find more concerned guidance and care at the hands of her parents and the family physician? The majority fail to recognize the value of providing parents with the opportunity to consult with their minor children at the time that the children are faced with the necessity of making important decisions. They would appear to require that parents anticipate the variety of situations that may confront their children and prepare them in advance to deal with any problem that may arise during the course of the child's minority. However, a "last minute" opportunity may be the parents' only opportunity to offer guidance and assistance to their daughter on her abortion decision. Although good communication is established between parent and child, communication on the particular subject of abortion may not arise in the absence of an actual pregnancy experience. Even where parents have previously discussed their views on abortion with their children, the parents should not be denied the opportunity to counsel and assist their daughter in her real-life abortion problem if it actually arises. Communication at

"Q. Did she indicate when you talked to her they would definitely perform the abortion?

"A. Yes, before November 1st.

"Q. Did she place any conditions on what she said? Did she indicate you had to meet with the doctor first, for example?

"A. No, she didn't.

"Q. Did they have any difficulty scheduling you before November 1st?

"A. Well, she told me right then they would schedule me but they weren't sure about the time and everything because they had to get it in before November 1st.

"Q. Was it difficult for you to come in as early as you did?

"A. I wanted it, yes, like for a week later, because it would have been more convenient. (Transcript at 137, 138.)

On the procedure actually followed at the abortion facility of the plaintiffs in the case at bar, see also n. 8 of the dissenting opinion *Baird* v. *Bellotti*, 393 F.Supp. 847, at pp. 859-860.

such time would be of the utmost importance. See *Doe* v. *Irwin*, 441 F.Supp. 1247, 1252-1253 (W.D. Mich. 1977). The deep interest and concern that parents naturally have in the welfare of their children constitute a human resource of great value and its utilization should be encouraged. It is common sense to assume that many pregnant minors would be reluctant to confront their parents with their pregnancy. The majority have raised that reluctance to constitutional status by giving the minor the right to conceal her pregnancy from her parents. This action not only encourages concealment and deception within the family unit, but also wastes vast and valuable parental resources.

In addition to proving directly beneficial to the pregnant minor, the statute's requirement of parental notification also provides assistance to others who may have a role in the minor's abortion decision. In those cases where a superior court judge is asked to consent to a minor's abortion, parental participation in the judicial proceeding will make available to the judge information on the minor's medical, social and emotional background which would be important for him to know in arriving at reliable findings on the degree of the minor's maturity, and the reasonableness of her decision. The SJC has ruled that the statutory standard for a judicial order granting consent to a minor's abortion is the best interest of the minor. To carry out his role in determining the best interests of the minor, a judge must have knowledge of all the relevant circumstances in the minor's life. A minor's parents are the persons who normally have the most knowledge of the many aspects of their daughter's life and their input in a judicial proceeding may well supply the judge with valuable information in determining what is in the minor's best interests. Also, if counsel is appointed for the minor in the judicial proceeding, counsel's access to the minor's parents and the knowledge they have of her background may result in providing the minor with more effective representation.

A third reason advanced by the majority for striking down the entire statute is that the statute permits a superior court judge to override an "informed and reasonable decision to have an abortion" made by a pregnant minor whom the judge has found to be capable of making such a decision. I would hold the part of the statute which authorizes a judge to override the minor's decision in such a case constitutionally invalid. In *Roe* v. *Wade*, the Supreme Court held that a woman's constitutional right of privacy includes the right to decide whether or not to terminate her pregnancy. 410 U.S. 113, 153-154 (1973). In *Planned Parenthood*, the Court extended this privacy right to minors and held that "the State may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." 428 U.S. at 74. These two cases establish that the state does not have the constitutional authority to delegate to a judge the power to unconditionally prohibit a mature minor, capable of making an informed abortion decision, from terminating her pregnancy. Under the Constitution as construed in *Roe* and *Planned Parenthood*, the state itself lacks the power to interpose an unconditional veto to the abortion decision of a mature minor and her physician.

In *Planned Parenthood*, however, the Court further stated (at p. 75):

> "We emphasize that our holding that § 3 (4) [absolute requirement of parental consent] is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy [citing *Bellotti* v. *Baird*, decided on the same day]. The fault with § 3 (4) is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination

of her pregnancy and does so without a sufficient justification for the restriction. . . ."

Mr. Justice Stewart, with whom Mr. Justice Powell joined, concurring with the Court, noted (at pp. 90-91):

"With respect to the state law's requirement of parental consent, § 3 (4), I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Bellotti* v. *Baird*, post, [428 U.S.] at 132, 147-148, suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child. (Footnote omitted.)

"There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." (Footnote omitted.)

In note 1 on page 91, Mr. Justice Stewart referred to the opinion of Mr. Justice Stevens (*id.*, pp. 102-105) concurring in part and dissenting in part, for some of the considerations that support the State's interest in encouraging parental consent.

Under the SJC's construction of the statute, a judge may disregard a minor's informed and reasonable decision if he determines that an abortion is not in her best interests. 360 N.E.2d at p. 293. Under that interpretation, a minor's decision may be found to be both informed and reasonable and still not be in her best interests. I fail to see how a minor's decision found to be truly informed and reasonable can at the same time be found to be contrary to the minor's best interests. The provision vesting in the judge the power to override a minor's "informed and reasonable decision" because it is not in her best interest would appear to be self-contradictory and incapable of rational application. If the judge found the minor's decision not to be in her best interests, how could he consistently find it to be reasonable? The lack of any ascertainable principle to guide a judge in differentiating between concepts of what is a reasonable and informed course for the minor to take and what course is in the minor's best interests leaves the resolution of the problem to the arbitrary will of the judge. I would strike the provision for judicial override and would limit the judge's role to a determination of whether the minor is capable of making the decision and whether her decision to have an abortion is informed and reasonable.

However, a statute invalid in part is not necessarily void in its entirety. The provision in the statute allowing a judicial override of a mature minor's informed consent may be severed from the statute.[11] The Supreme Court has firmly rejected "a

[11] The majority define severability as "a process of striking out," n. 10, and under this definition, striking out the provision for judicial override constitutes a severance. However, as stated by Mr. Justice Cardozo, "Severance does not depend upon the separation of the good from the bad by paragraphs

severability rule that required invalidation of an entire statute if any part of it was unconstitutionally overbroad, unless its different parts could be read as wholly independent provisions. . . . Consequently, we need not find . . . [a statute] constitutional in all its possible applications in order to uphold its facial constitutionality." *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971). "The general rule on separability, when part of a statute or some of its applications are declared to be constitutionally invalid is that the rest of the statute shall stand intact if the valid provisions or applications are capable of being given effect standing alone, and if the Legislature would have intended the statutes to stand with the invalid provisions stricken out." *Baird* v. *Davoren*, 346 F.Supp. 515, 522 (D. Mass. 1972). See *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976); Opinion of the Justices, 330 Mass. 713, 726 (1953). The final authority on whether or not a state law should be construed as severable is the state court. *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924); *Stevens* v. *Campbell*, 332 F. Supp. 102, 107 (D. Mass. 1971). The Massachusetts Supreme Judicial Court has stated that it is clear "the Legislature intended to pass an act which was constitutionally acceptable and, *even more important*, to save as much of the statute's purpose as it could if any explicit statutory provision could not survive constitutional attack. Statute 1974, c. 706, § 2, provides that '[i]f any section, subsection, sentence or clause of this act is held to be unconstitutional, such holding shall not affect the remaining portions of this act.'" 360 N.E.2d at 291. (Emphasis added.) The SJC's finding of legislative intent is binding on us. In view of the language used, it cannot seriously be doubted that

or sentences in the text of the enactment. . . . The principle of division is not a principle of form. It is a principle of function." *People* v. *Knapp*, 230 N.Y. 48, 60, 129 N.E. 202, 207 (1920). Invalid applications, as well as invalid sentences or paragraphs, may be severed. *Loeb* v. *Columbia Township Trustees*, 179 U.S. 472, 490 (1900); *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971); *Doliner* v. *Town Clerk of Millis*, 343 Mass. 10, 15 (1961).

the Legislature would have intended the statute to stand with the invalid provision stricken. It is the expressed intention of both the Legislature and the SJC that as much of the statute as possible be saved. The invalidation of the entire statute would destroy a method of structuring the abortion decision designed to protect the very large and continuing class of pregnant minors.[12] By far the better course is to allow the law to operate where it can do so constitutionally, which, under the challenged statute, is in the great majority of the cases governed by it.

The severance of the judicial override will leave the essence of the statutory scheme intact. This is not an instance of judicial excision making the remainder of the statute difficult to interpret or apply. *Baird* v. *Eisenstadt*, 429 F.2d 1398, 1399 (1st Cir. 1970), *aff'd on other grounds*, 405 U.S. 438 (1972). The exclusion of the judicial override would leave the remainder of the statute entirely clear.

The majority also find that the statute constitutes a denial of equal protection in that it unreasonably distinguishes "between a minor and an adult, given a finding of maturity and informed consent." By striking the provision on judicial override, a minor who is found by a judge to be capable of a reasonable and informed consent will be treated as an adult and allowed to exercise her right to an abortion.

Plaintiffs contend that the statute denies equal protection in that it irrationally distinguishes between abortions and other

[12]The value to a minor of parental involvement in her abortion decision-making is not disputed. (See Plaintiffs' Responses to Defendants' Requests for Admissions, ¶ 67; Defendants' Responses to Plaintiffs' Requests for Admissions, ¶ 6; Dec. 7, 1974, Tr. at 27, 67; Dec. 30, 1974, Tr. at 9, 48, 75, 77, 86, 119, 131; Dec. 31, 1974, Tr. at 24; Jan. 28, 1975, Tr. at 18, 33, 49, 50.)

medical procedures because the mature minor rule[13] and Mass. G.L. c. 112, § 12F,[14] which allow certain minors to consent to medical procedures without parental involvement, are

[13]"[W]here the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth." 360 N.E.2d at 296.

[14]Mass. G.L. c. 112, § 12F: "No physician, dentist or hospital shall be held liable for damages for failure to obtain consent of a parent, legal guardian, or other person having custody or control of a minor child, or of the spouse of a patient, to emergency examination and treatment, including blood transfusions, when delay in treatment will endanger the life, limb, or mental well-being of the patient.

"Any minor may give consent to his medical or dental care at the time such care is sought if (i) he is married, widowed, divorced; or (ii) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or (iii) he is a member of any of the armed forces; or (iv) she is pregnant or believes herself to be pregnant; or (v) he is living separate and apart from his parent or legal guardian, and is managing his own financial affairs; or (vi) he reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease.

"Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization.

"Consent given under this section shall not be subject to later disaffirmance because of minority. The consent of the parent or legal guardian shall not be required to authorize such care and, notwithstanding any other provisions of law, such parent or legal guardian shall not be liable for the payment for any care rendered pursuant to this section unless such parent or legal guardian has expressly agreed to pay for such care.

"No physician or dentist, nor any hospital, clinic or infirmary shall be liable, civilly and criminally, for not obtaining the consent of the parent or legal guardian to render medical or dental care to a minor, if, at the time such care was rendered, such person or facility: (i) relied in good faith upon the representations of such minor that he is legally able to consent to such treatment under this section; or (ii) relied in good faith upon the representations of such minor that he is over eighteen years of age.

"All information and records kept in connection with the medical or dental care of a minor who consents thereto in accordance with this section shall

not applicable to abortions.[15] In *Bellotti* v. *Baird*, the Supreme Court stated: "As we hold today in Planned Parenthood, however, not all distinctions between abortion and other procedures is forbidden. . . . The constitutionality of such distinction will depend upon its degree and the justification for it." 428 U.S. at 149, 150.

The traditional rational basis test is to be used in testing any classifications made by the statute, since no suspect classification is involved, *Maher* v. *Roe*, 432 U.S. 464, 471 (1977), and a state need not establish a compelling interest for treating abortion differently from other medical procedures unless the state treatment is an unduly burdensome interference with a woman's freedom to decide whether or not to abort. *Id.*, at 473. A state's interest in its minor citizens may be furthered by placing regulations on a minor's conduct which might be impermissible if imposed on an adult. *Ginsberg* v. *New York*, 390 U.S. 629, 638-639 (1968). Section 12S (formerly § 12P), by requiring parental involvement in a minor's abortion decision, helps the minor to arrive at a decision that is in her best interests and does not preclude or unduly burden the exercise of her privacy rights.[16]

be confidential between the minor and the physician or dentist, and shall not be released except upon the written consent of the minor or a proper judicial order. When the physician or dentist attending a minor reasonably believes the condition of said minor to be so serious that his life or limb is endangered, the physician or dentist shall notify the parents, legal guardian or foster parents of said condition and shall inform the minor of said notification."

[15]"Our discussion of the mature minor rule as to operations generally has no application to non-emergency abortions because parental consultation, if possible, is mandated by statute." 360 N.E.2d at 297.

Mass. G.L. c. 112, § 12F: "Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization."

[16]The Supreme Court has indicated that strict scrutiny is improper when reviewing statutes dealing with the privacy rights of minors and that state regulations inhibiting these rights are valid "if they serve 'any significant

Under the rational basis test the distinctions drawn by the statute must be rationally related to a constitutionally permissible purpose. *Maher* v. *Roe*, 432 U.S. at 478. The Massachusetts statute, section 12P (now § 12S), clearly satisfies this standard. In fact, the state interests furthered by the statute greatly exceed this minimal level and are also sufficient to withstand a test if heightened scrutiny.

The Supreme Court has already found that abortion differs significantly from other medical procedures. "The simple answer to the argument that similar requirements are not imposed for other medical procedures is that such procedures do not involve the termination of a potential human life."[17] *Maher* v. *Roe*, 432 U.S. at 480. This fundamental difference between abortion and other medical procedures is sufficient to justify separate treatment for the abortion decision. The

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state interest . . . that is not present in the case of an adult.'" *Carey* v. *Population Services International*, 431 U.S. 678, 693 (1977). "This test is apparently less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults. . . . Such lesser scrutiny is appropriate both because of the States' greater latitude to regulate the conduct of children, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Ginsberg* v. *New York*, 390 U.S. 629 (1968), and because the right of privacy implicated here is 'the interest in independence in making certain kinds of important decisions,' *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977), and the law has generally regarded minors as having a lesser capability for making important decisions. See, *e.g.*, *Planned Parenthood*, 428 U.S., at 102 (STEVENS, J., concurring in part and dissenting in part)." *Id.*, at n. 15.

[17] A basic difference between abortion and other medical procedures was noted by plaintiffs' expert witness when she was asked to compare the psychological impact of an abortion with the impact of another medical procedure, such as a tonsillectomy. She testified that "they are really not comparable issues. . . . You are dealing with apples and oranges. They are not the same kind of thing. A tonsillectomy is a procedure that is done because you have something wrong . . . You have been sick. An abortion is something where you are not sick . . . a tonsillectomy is, basically, a noncontroversial procedure which the doctor recommends and people generally go along with." (Deposition of Dr. Nadelson, I-30-33.)

state's compelling concern for the welfare of its minor citizens creates an additional interest justifying the statute since the state's interest in protecting the health and welfare of its adolescents is certainly a constitutionally permissible one. The statute aims at ensuring that a minor understands and takes seriously the message of pregnancy.[18] In providing a structure to minimize the possibility of improvident decisions with serious consequences, the statute furthers the state's important interest in protecting its young citizens. It is clear that abortion has psychological and emotional consequences which are unique and that decisions to abort involve considerations that are not present in decisions to undergo other medical procedures. Where minors are involved, the problems in making a decision to abort are intensified. See note 8, *supra*. Thus, the fundamental difference between abortion and other medical procedures and the state's compelling concern for its minor citizens justify separate consent requirements for a minor's abortion decision.

Plaintiffs also argue that the statute irrationally discriminates between unmarried and married, widowed or divorced minors. The distinction between married (or formerly married) and unmarried minors is not irrational. Married minors have left their parents' families to create a new family with new responsibilities; they have become emancipated and their parents are no longer legally responsible for them. See *Califano* v. *Jobst*, *supra*, at 4006. They have obtained parental consent to their marriage. Mass. G.L. c. 207,

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[18] The evidence shows a high rate of recidivism of unwanted teenage pregnancies. See Plaintiffs' Responses to Defendants' Requests for Admissions, ¶ 37; Oct. 18, 1977, Trial Tr. at 95. Plaintiffs admit that "[f]or the adolescent, failure of resolution of the unwanted pregnancy crisis can potentially arrest development progress. The message of pregnancy must be understood and taken seriously if repetition is to be avoided." (Plaintiffs' Responses to Defendants' Requests for Admissions, ¶ 59; see also *id.*, ¶ 56.)

§ 7. A married minor's decision to abort does not affect her parents and their responsibility to her in the same way as does an unmarried minor's decision to abort. The statute simply recognizes that marriage alters the relationship between a minor and her parents.

The Legislature has enacted a statute which is designed to aid a pregnant minor in making a reasoned decision whether or not to terminate her pregnancy.[19] The statute logically selects the minor's parents as the appropriate persons to be given the opportunity in the first instance to guide their child, because they are the natural and legal guardians of the child. If the parents refuse consent, the state, through its courts, in its role of parens patriae, will be available to protect the minor's interests. With the severance of the provision for judicial override, where the minor has made an informed and reasonable decision, the judge will consent to her abortion. If she is found incapable of giving an informed consent, the judge will either grant or withhold consent depending on which course he finds on the evidence to be in the minor's best interests.

The importance of the parental role in the upbringing of children has been well established and repeatedly reaffirmed by the Supreme Court. *Myer* v. *Nebraska*, 262 U.S. 390, 399

[19]The majority express disapproval of the "chameleon-like" statute which the SJC has construed to "require as much parental consultation as is permissible constitutionally." 360 N.E.2d at 294. The majority demand greater precision from the Legislature than can be reasonably expected in this area of the law. The Supreme Court has not yet defined the permissible scope of parental involvement in an unmarried minor's decision to seek an abortion. In view of the Legislature's attempt to obtain maximum parental input within constitutional limits, the element of flexibility in the SJC's construction is reasonable. Insisting that the Legislature enact a statute that is perfect from its inception and striking down any attempt that does not meet this standard, while refusing to give the Legislature any clear guidance on what would be permissible, does not appear to afford a better solution.

(1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); *Wisconsin* v. *Yoder*, 406 U.S. 205, 232-233 (1972); *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 843-844 (1977); *Zablocki* v. *Redhail*, 46 U.S.L.W. 4093, 4096 (U.S. Jan. 18, 1978). Parental authority and the family unit have been constantly accorded constitutional protection because of legislative and judicial recognition that the family is fundamental in our society. *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). *Moore* v. *East Cleveland*, 431 U.S. 494 (1977). "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.*, at 503-504.

Parents have rights and responsibilities that inhere in the parent-child relationship and stem from the fact, nature and purpose of parenthood. These rights and responsibilities are not inimical to the minor's rights and welfare. They exist for the benefit of the child and reflect the child's very real need for proper guidance and protection during the child's formative years. The state has a compelling interest in protecting the parental rights and duties against unauthorized intrusion by third persons. The statute under attack expresses this compelling interest.

The parental right to control, subject to constitutional limitations, the upbringing of children is a natural counterpart to the parental duty to support, guide and protect the child. The occurrence of pregnancy in a minor does not absolve her parents of responsibility to support, protect and guide their daughter, nor does it eliminate the daughter's need for parental support, protection and guidance. To the contrary, it is a period when parental assistance is urgent.

The state has a compelling interest in protecting and furthering the health and welfare of its minors.[20] It has done so in this statute by protecting them from undue outside influences and hasty, unreasoned decisions on abortions. This is a permissible exercise of state power and the statute is therefore constitutional.

For the reasons stated in this and in my previous[21] dissenting opinion, I would uphold the constitutionality of the statute.

ANTHONY JULIAN,
U.S. Senior District Judge.

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[20] See the opinions in *Danforth* which comment on the state interests which justify legislation in this area:

STEWART, J., with POWELL, J.:

"There can be little doubt that the state furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support." 428 U.S. at 91.

WHITE, J., with BURGER and RHENQUIST, JJ.:

"The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests." 428 U.S. at 95.

STEVENS, J.:

"The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible . . . [E]ven if it [the abortion decision] is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative." 428 U.S. at 102-103.

[21] 393 F.Supp. at p. 857.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM BAIRD; MARY MOE;
PARENTS AID SOCIETY, INC.;
GERALD ZUPNICK, M.D.; and all
others similarly situated,
Plaintiffs,

v.

CIVIL ACTION
No. 74-4992-F

FRANCIS X. BELLOTTI, Attorney General
of the Commonwealth of Massachusetts;
GARRETT BYRNE, District Attorney of the
County of Suffolk; the District Attorneys
for all other Counties, their agents, successors,
those acting in concert with them, and all others
similarly situated,
Defendants,

JANE HUNERWADEL,
Defendant-Intervenor.

Order.

In accordance with our opinion of May 2, 1978 Section S of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby

declared to be unconstitutional and void, and defendants are enjoined from enforcement thereof.

BAILEY ALDRICH,
U.S. Circuit Judge.

FRANK H. FREEDMAN,
U.S. District Judge.

May 2, 1978.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM BAIRD; MARY MOE;
PARENTS AID SOCIETY, INC.;
GERALD ZUPNICK, M.D.; and all
others similarly situated,
Plaintiffs,

v.

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,
Defendants,

CIVIL ACTION
No. 74-4992-F

JANE HUNERWADEL,
Defendant-Intervenor.

Amended Order.

(Amending Order of May 2, 1978)

In accordance with our opinion of May 2, 1978, Section 12S of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby

declared to be unconstitutional and void, and defendants are enjoined from enforcement thereof.

BAILEY ALDRICH,
U.S. Circuit Judge.

FRANK H. FREEDMAN,
U.S. District Judge.

June 20, 1978

Appendix C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WILLIAM BAIRD, ET AL.
PLAINTIFFS

CIVIL ACTION
No. 74-4992-F

v.

FRANCIS X. BELLOTTI, ET AL.
DEFENDANTS

Notice of Appeal.

Defendants Francis X. Bellotti, et al., give notice that they appeal to the Supreme Court of the United States from this Court's order of May 2, 1978 permanently enjoining the defendants from enforcing G.L. ch. 112, § 12S, as amended by St. 1977, ch. 397. Defendants claim their appeal pursuant to 28 U.S.C. § 1253 (1970).

By their attorneys,
FRANCIS X. BELLOTTI,
Attorney General,
GARRICK F. COLE,
THOMAS R. KILEY,
MICHAEL B. MEYER,
Assistant Attorneys General.

Dated: June 26, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WILLIAM BAIRD, et al.,
Plaintiffs,

v.

FRANCIS X. BELLOTTI, et al.,
Defendants,

JANE HUNERWADEL,
Defendant-Intervenor.

CIVIL ACTION
No. 74-4992-F

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that the defendant-intervenor, Jane Hunerwadel, on behalf of herself and all others similarly situated, hereby appeals to the Supreme Court of the United States from the final Amended Order entered on June 20, 1978, amending the order of May 2, 1978, declaring Mass. G.L. c. 112, sec. 12S, unconstitutional and void and enjoining enforcement thereof.

This appeal is taken pursuant to 28 U.S.C., sec. 1253.

Respectfully submitted,
JANE HUNERWADEL,
By her attorney,
BRIAN A. RILEY.

DATED: JUNE 26, 1978

Appendix D.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WILLIAM BAIRD, ET AL.,
PLAINTIFFS

v.

FRANCIS X. BELLOTTI, ET AL.,
DEFENDANTS

CIVIL ACTION
No. 74-4992-F

Defendants' First Set of Requests for Admissions to Plaintiff Gerald Zupnick.

To: Gerald Zupnick, M.D.
c/o Parents Aid Society, Inc.
673 Boylston Street
Boston, Massachusetts

Pursuant to Fed.R.Civ.P. 36, defendants Francis X. Bellotti, et al., request that you respond to the following requests for admissions. Your answers must be written and made under oath. You must serve your answers upon all parties and file them with the Court within thirty days after their service upon you, or within such other time as the Court determines.

Defendants request that you admit the truth of the following statements, and, as appropriate, the truth of any subsidiary assertions about the statements:

I. General Background Statements

A. *Distribution Of Abortions And Pregnancies By Age Of Adolescent*

1. The following table sets forth reasonably accurate approximations of the numbers of female adolescents residing in Massachusetts, by age, as of June, 1976:

Age	Number of Female Adolescents
10	53,500
11	56,000
12	57,000
13	55,500
14	58,000
15	58,000
16	58,000
17	58,000

Source: Commonwealth of Massachusetts, Department of Education, Enrollment Statistics for School Year 1975-1976; Statistical Abstracts of the United States, 1976, p. 11, 27; U.S. Bureau of the Census, Census of Population: 1970 DETAILED CHARACTERISTICS, Final Report PC(1)-D(23) Massachusetts, Table 138.

2. During the calendar year 1976, hospitals and clinics in Massachusetts performed approximately 33,000 abortions. Of this number, approximately 30,000 or 91% were performed during the first trimester.

Source: Commonwealth of Massachusetts, Department of Public Health, Abortion Reporting System, Statistics of Induced Abortions.

3. The following statistics are reasonably accurate approximations of the incidences of pregnancies and abortions among female adolescents in the United States:

a. Approximately 1,000,000 persons or 10% of the female adolescent population age 15-19 in the United States become pregnant each year;

b. Approximately 590,000 persons or 5.9% of the female adolescent population age 15-19 in the United States give birth each year.

c. Approximately 270,000 persons or 2.7% of the female adolescent population age 15-19 in the United States undergo an induced abortion each year;

d. Approximately 140,000 persons or 1.4% of the female adolescent population age 15-19 in the United States experience miscarriages each year;

e. Approximately 30,000 persons or 0.7% of the female adolescent population in the United States under age 15 (the great majority of which is composed of persons 13 or 14) become pregnant each year;

f. Approximately 13,500 persons or 0.315% of the female adolescent population in the United States under age 15 (the great majority of which is composed of persons 13 or 14) undergo an induced abortion each year;

g. Approximately 12,600 persons or 0.294% of the female adolescent population in the United States under age 15 (the great majority of which is composed of persons 13 or 14) give birth each year;

h. Approximately 3,900 persons or 0.091% of the female adolescent population in the United States under age 15 (the great majority of which is composed of persons 13 or 14) experience miscarriages each year.

Source: "11 Million Teenagers", Planned Parenthood Federation of America, Allan Guttmacher Institute (1976); Jaffe & Dryfoos, "Fertility Control and Services for Adolescents: Access and Utilization," 8 Family Planning Perspectives 4: 167, 174 (1976).

4. There is no reason to believe that the distribution of adolescent pregnancies and their outcomes stated in paragraph (3), above, is not similar to the distribution of adolescent pregnancies and their outcomes among the Commonwealth's female adolescent population.

5. Assuming that the distribution of adolescent pregnancies and their outcomes stated in paragraph (3) is similar to the distribution of adolescent pregnancies and their outcome among the Commonwealth's female adolescent population, the following table sets forth reasonably accurate approximations of the number of pregnancies and their outcomes which female adolescents in Massachusetts experience each year by age category:

Age	Pregnancies	Abortions	Births	Miscarriages
13	N/A	N/A	N/A	N/A
13-14	660	300	275	85
15-19	22,000	5,940	12,980	3,080

Source: Paragraphs 1, 2, and 3, above.

* * * * * * * * *

8. (a) During calendar year 1975, hospitals and clinics in New York State performed 153,484 abortions. Of this number, 1,670 or 1.08% were performed on female adolescents under 15 years of age, and 38,345 or 24.98% were performed on female adolescents between 15 and 19 years of age.

(b) 704 female Massachusetts residents obtained abortions in New York State in 1975. This number amounted to 0.46% of the total abortions performed in New York State in 1975.

(c) In New York State, during the years 1971-1975, the distribution of abortions by age of females obtaining abortions remained fairly constant, i.e., approximately 1% were performed on female adolescents under 15 each year and approximately 25% were performed on female adolescents 15-19 years of age.

Source: New York State Department of Health, Report of Selected Characteristics of Induced Terminations of Pregnancy Recorded in New York State January-December 1975 With Five Year Summary 1971-1975 (undated).

* * * * * * * * *

46. The following table summarizes the distribution of pregnancies in girls under 16 years of age as determined by twelve studies conducted between the years 1935 and 1967. With respect to this table, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

Table 49. AGE INCIDENCE OF PREGNANCY IN ADOLESCENTS UNDER 16 YEARS OF AGE (12 SERIES OF CASES)

REPORTER	YEAR	AGE UNDER 11	11	12	13	14	15	16
Aznar & Bennett	1961	0	0	1	19	99	312	(662)
Briggs et al.	1962	0	0	3	7	26	77	(88)
Clough	1958	0	0	0	1	8	47	(119)
Hacker et al.	1952	0	0	4	12	52	141	(281)
Marchetti & Menaker	1960	0	0	12	19	77	163	
Morrison	1953	0	0	4	39	165	467	
Posner & Pulver	1935	0	0	2	10	26	62	
Poliakoff	1958	0	0	3	11	77	208	
Semmens & McGlamory	1960	0	1	0	7	16	88	(171)
Sinclair	1952	0	0	1	3	47	168	(481)
Clark et al.	1962	1	0	1	8	31	80	(170)
Clark et al.	1967	0	2	5	14	50	109	(220)
No. each age		1	3	36	150	674	1822	(2192)
Total pregnancies under 16 years of age								2686*

*Total does not include 16 year olds.

47. The following table records the incidence and outcomes of juvenile pregnancies in girls under eleven years of age. With respect to this table, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

Table 51. 21 Juvenile Pregnancies under 11 Years of Age

Reporter	Year	Child's Age		Type of Delivery	Condition of Offspring
		At Menarche	At Delivery		
von Mandelseo	1658	3	6-7/12	—	—
Sue	1779	2	8-9/12	—	Stillborn
von Haller	1784	2	8-9/12	Forceps	Stillborn
de la Sagra	1821	10	10-9/12	—	—
d'Outrepont	1826	-	9	Aborted	3 months
Carus	1842	2	8	—	—
Smith	1848	2	8-10/12	Normal	Stillborn
Rowlett	1834	1	10	Normal	Normal
Curtis	1863	9	10-8/12	Normal	—
Molitor	1878	4	8-9/12	Aborted	3 months
Dodd	1881	1	9-8/12	—	Neonatal death
Dodd	1882	1	8-10/12	—	Born with pubic hair and large breasts
Gleave	1895	5	10-1/12	—	Neonatal death
Pittman	1908	-	9	—	—
Chaschinsky & Jerschow	1933	3-4	6-9/12	—	Stillborn
Keane	1933	-	6-8/12	—	—
Comby	1938	3	8-3/12	—	—
Escomel	1939	8 mo.	5-8/12	Cesarean Section	Normal
Colareta	1957	-	9-8/12	Normal	Normal
Dodge	1958	8-6/12	9-6/12	Normal	Normal
Clark et al.	1962	-	10	—	—

48. The author of the medical textbook from which the table appearing in paragraph forty seven is reproduced included in his discussion of juvenile pregnancy several comments about the data included in the table. Included in that discussion was the following quote.

With respect to the following quotation, defendants request that you admit that:

a. the quoted material actually appears in the cited journal as it is reproduced here;

b. the journal in which the quoted material appears is a reliable medical or scientific authority;

c. the quoted material's factual statements are correct;

d. the quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgment and opinions:

> Undoubtedly, there are more than those [juvenile pregnancies] noted, particularly in the 10 year old group.

Source for statements contained in paragraphs 43-48: J.W. Huffman, the Gynecology of Childhood and Adolescence, ch. 27, W.B. Saunders (1968).

49. Girls as young as nine years of age have sought birth control advice from Planned Parenthood clinics.

Source: Interview with Dr. Gerry Oliva, medical director of Planned Parenthood affiliate in San Francisco, California, reported in Los Angeles Herald Examiner, October 25, 1975, p.-A-3, col.-1.

[Note: With few exceptions, these requests for admissions do not represent evidence of record. They are reprinted for informational purposes only.]

* * * * * * * * *

Supreme Court, U. S.
FILED
DEC 14 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

NOS. 78-329, 78-330

FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS IN NO. 78-329,
AND
JANE HUNERWADEL,
APPELLANT IN NO. 78-330

v.

WILLIAM BAIRD ET AL.,
APPELLEES IN NOS. 78-329, 78-330

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Volume I
Docket Entries, Pleadings, and Opinions

Appeals Docketed August 25, 1978

Jurisdiction Noted October 30, 1978

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United States District Court
District of Massachusetts.

WILLIAM BAIRD; MARY MOE I; GERALD ZUPNICK, M.D.; PARENTS AID SOCIETY, INC.; and all others similarly situated,
PLAINTIFFS,

v.

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; their agents, successors, those acting in concert with them, and all others similarly situated,
DEFENDANTS,

JANE HUNERWADEL, individually and on behalf of all others similarly situated and, further, as next friend of her minor daughters who are of childbearing age and are or may become pregnant, and all others similarly situated,
DEFENDANT-INTERVENOR.

CIVIL ACTION
No. 74-4992-F

Docket Entries

1974		
October		
	30	Complaint filed, request for TRO, three-judge court.
	30	Summons issued.
	31	Affidavit of notice and service filed.
	31	Motion for leave to have out-of-state counsel appear Pro Hac Vice FILED.
	31	Application for temporary restraining order FILED.
	31	Memorandum of law FILED.
	31	FREEDMAN, J. Hearing on plaintiff's motion for temporary restraining order and request for three-judge court; arguments; Court directs the convening of a three-judge court and further directs that the requested temporary restraining order be entered.

1974

October

31 FREEDMAN, J. ORDER ENTERED . . . . that defendants are hereby enjoined from enforcing the parental consent requirement of the Mass. Abortion Law, Gen. Laws, ch. 112, sec. 12P, pending further order of this court.

November

6 Designation of three-judge court - Judge Aldrich, Judge Julian, Judge Freedman.

13 Ds' motion to dismiss and/or for summary judgment and motion for a more definite statement FILED with cs.

13 Notice of deposition of WILLIAM BAIRD, FILED with cs.

13 Notice of deposition of MARY MOE I and MARY MOE II, FILED with cs.

November

13 Notice of deposition of GERALD ZUPNICK, FILED with cs.

14 JUDGES ALDRICH, JULIAN, FREEDMAN - Three-judge court hearing on continuation of temporary restraining order; after arguments; plaintiffs' motion to add additional party plaintiffs, allowed (affidavits of Mary Moe III and Mary Moe IV to be filed with the Clerk and impounded). Prospective motion of parents to intervene as defendants will be allowed, if filed, by a single justice. It is ordered that dissolution of temporary restraining order is denied; (Judge Anthony Julian, dissenting). Memorandum of defendants in

November

14 support of their motion to dismiss and/or for summary judgment, FILED. Hearing on preliminary injunction scheduled for Dec. 9, 1974, at 10:00 a.m.

19 Interrogatories propounded by defendants to plaintiffs pursuant to Rule 26(b)(4)(A)(ii) FILED with cs.

19 Ds' motion to compel plaintiffs to answer interrogatories regarding their expert witness by November 29, 1974, FILED with cs.

19 Motion to intervene as defendants (Parents) FILED with cs.

19 Defendant-Intervenors' Answer and Counterclaim FILED with cs.

November

20 FREEDMAN, J. Re motion to intervene - "Motion to intervene allowed. Motion to impound will be acted upon by the three-judge court." cc/cl.

29 Motion for leave to appear of Brian Riley in behalf of intervenors FILED. cs.

December

4 Appearance of Robert Reynolds in association with Mary Welby as counsel for intervenors.

9 P's motion to join all district attorneys in Commonwealth as members of defendant class and to extend injunctive restraints to all said defendants FILED with cs.

9 P's motion to vacate order allowing intervention FILED with cs.

December

9 Memorandum of law in support of motion to vacate order allowing intervention FILED.

9 Ps' motion to certify plaintiffs' classes FILED.

9 Memorandum of law in support of motion to certify class action FILED.

9 Motion of the Civil Liberties Union of Massachusetts and the Planned Parenthood League of Massachusetts for leave to file a brief Amici Curiae FILED.

9 Memorandum of interveners in opposition to plaintiffs' request for a preliminary injunction FILED with cs. ALDRICH, C.J., JULIAN, S.D.J.

9 FREEDMAN, J. Motion of Mary T. Welby Esq. for leave to appear on behalf of intervenors ALLOWED. Motion

December

9 to join all District Attorneys in Commonwealth as members of defendant class and to extend injunctive restraints to all said defendants, ALLOWED. Motion of Civil Liberties Union of Mass. and the Planned Parenthood League of Mass. for leave to file a brief of Amici Curiae, ALLOWED. Hearing on plaintiff's motion for preliminary injunction; evidence; testimony; continued to Monday, December 30, 1974 at 10:00 a.m. for further hearings pursuant to F.R.C.P. 65(a)(2) injunctive relief and merits.

December

9 FAGAN, DEP. CLERK Re motion of the Civil Liberties Union of Massachusetts and the Planned Parenthood League of Mass. for leave to file a brief Amici Curiae - "ALLOWED". cc/cl.

9 FAGAN, DEP. CLERK Re motion to join all district attorneys in Commonwealth as members of defendant class - "ALLOWED". cc/cl.

13 Defendants' motion in opposition to plaintiffs' motion to vacate order allowing intervention, and in opposition to plaintiffs' motion to certify plaintiffs' class FILED with cs.

13 Defendants' memorandum in support of their motion in opposition to plaintiffs'

1974

December

13 motions to vacate this Court's order of intervention, and to certify plaintiffs' classes FILED.

13 Defendants' motion to dismiss plaintiff's complaint as to Mary Moe II as a result of her failure to attend deposition FILED WITH CS.

13 Memorandum of interveners in opposition to plaintiffs' motion to vacate order allowing intervention FILED with cs.

19 Letter dated Dec. 19 from Plaintiffs' counsel requesting two hour in camera hearing.

23 Defendants' motion requesting the court to take additional testimony during a day in late January FILED with cs.

1974

December

30 ALDRICH, C.J., FREEDMAN, D.J., JULIAN S.D.J. three judge court hearing on plaintiff's motion for preliminary injunction consolidated with merits; evidence; defendants request for disclosure, filed. Stenographic transcript of proceedings on December 7, 1974 filed.

31 ALDRICH, C.J., FREEDMAN, D.J., JULIAN S.D.J. Hearing on plaintiffs motion for preliminary injunction; evidence; luncheon recess; In Camera hearing witness, Mary Moe I. Court orders testimony at In Camera hearing be impounded, plaintiff, plaintiff rests; case continued to January 28, 1975 at 10 a.m. 1974

December

30 Court reporter's transcript of proceedings of December 7, 1974.

1975

January

7 FREEDMAN, J. ORDER ENTERED . . . . The Court orders that all briefs that parties desire to file in this case shall be filed with the Clerk of Courts by January 28, 1975. cc/cl.

24 Letter dated January 23, 1975 from Interveners attorney stating corrections in Interveners Motion to Intervene and Answer.

27 Court reporter's transcript of proceedings December 30, 1974.

27 Court reporter's transcript of proceedings December 31, 1974

January

27 Interveners' brief in opposition to plaintiffs' complaint for declaratory and injunctive relief FILED with cs. (Copies delivered to Judges Julian and Aldrich).

28 Appearances of Brian Riley and Mary Laura Russell as counsel for intervenors.

28 Appearance of John Mahoney II as counsel for D.A. Garrett Byrne FILED.

28 FREEDMAN, J. Hearing on plaintiff's motion for preliminary injunction continued from December 31, 1974; defendants' evidence; defendants' brief filed; evidence; TAKEN UNDER ADVISEMENT.

1975

February

18 Court reporter's transcript of proceedings of January 28, 1975 FILED.

19 Copy of recent decision by U.S. District Court for district of Colorado filed by Mr. Lucas.

26 DEPOSITIONS OF DR. G. ZUPNICK & WILLIAM BAIRD.

26 Copy of decision re Planned Parenthood of Central Missouri vs Danforth et al received.

April

28 ALDRICH, D.J. AND FREEDMAN, D.J. Opinion filed.

28 JULIAN, D.J. Dissenting opinion filed.

28 ALDRICH, D.J. AND FREEDMAN, D.J. ORDER ENTERED . . . In accordance with our opinion of April 28, 1975, Section P

1975

April

28 of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby declared to be unconstitutional and void, and defendants are enjoined from enforcement thereof. cc/cl.

29 Copy of Opinion, Dissenting opinion and Order to West Publishing, Mass Lawyers Weekly, NCAIR and Opinion book, U.S. Law Week and Administrative Office of the U.S. Courts.

May

9 ALDRICH, D.J., FREEDMAN, D.J. SUBSTITUTE ORDER ENTERED . . . in accordance with our opinion of April 28, 1975, Sec. 12P of Mass.

1975

May

9 G.L. 112 and such other portions of the chapter insofar as they make specific reference thereto are hereby declared to be unconstitutional and void and defendants are enjoined from enforcement thereof. cc/cl.

16 Appearance of Michael Eby, Asst Atty General for defts filed.

16 Notice of Appeal to the Supreme Court of the United States re: defts.

20 Notice of Appeal to the Supreme Court of the United States re: deft-intervenor filed.

June

20 Certified copy of Docket entries and original pleadings forwarded to the United States Supreme Court.1975

November

25 Certified copies of the Orders from the Supreme Court of the United States noting probable jurisdiction in the above entitled cases.

1976

July

6 Application for temporary restraining order and preliminary injunction pending the certification of state law questions to the Supreme Judicial Court FILED.

6 Memorandum of law in support of application for temporary restraining order and preliminary injunction

July

6 pending the certification of state law questions to the Supreme Judicial Court FILED CS.

12 Letter from the Clerk to Messrs. Lucas and Bellotti, cc Mr. Riley re certification of questions filed.

21 ALDRICH, C.J. FREEDMAN, D.J., JULIAN, S.D.J. ORDER entered dissolving injunction. cc/Mr. Lucas, Mr. Rosenfeld and Mr. Riley. Telephone notice to Mr. Rosenfeld and Mr. Lucas.

21 Defendants' proposed questions for certification to the Supreme Judicial Court FILED cs.

21 Memorandum of reasons in support of defendants' proposed questions for

July

21 certification to the Supreme Judicial Court FILED.

* 19 Letter dated July 19, 1976 from Judge Freedman to Attorney General Bellotti.

21 Letter dated July 21, 1976 from Attorney General Bellotti to Judge Freedman.

30 Plaintiffs' proposed questions for certification to the Supreme Judicial Court of Massachusetts FILED cs.

30 Memorandum in support of plaintiffs'proposed questions FILED cs.

30 Motion in support of defendants' proposed questions for certification to the Supreme Judicial Court FILED cs.

30 Letter dated July 28, 1976 from Attorney Mary Russell to Judge Freedman regarding

July

30 Judge Freedman's letter of July 19, 1976 to A.G. Bellotti.

30 FREEDMAN, J. ORDER ENTERED . . . . Defts and intervenors are given permission to file a written response to the plaintiffs' proposed questions for certification to the Supreme Judicial Court of Massachusetts; said comments to be filed no later than Monday, August 9, 1976, cc/cl.1976

30 Memorandum in support of plaintiffs'proposed questions FILED cs.

30 Motion in support of defendants' proposed questions for certification to the Supreme Judicial Court FILED cs.

July

30 Letter dated July 28, 1976 from Attorney Mary Russell to Judge Freedman regarding Judge Freedman's letter of July 19, 1976 to A.G. Bellotti.

30 FREEDMAN, J. ORDER ENTERED . . . . Defts and intervenors are given permission to file a written response to the plaintiffs' proposed questions for certification to the Supreme

30 Judicial Court of Massachusetts; said comments to be filed no later than Monday, August 9, 1976, cc/cl.

August

4 Certified copy of judgment of the Supreme Court, (United States) . . . . it is ordered and adjudged by this

August

4 Court that the judgment of the U.S. District Court in these causes be and the same is hereby vacated . . . . and the same are hereby remanded to the U.S. District Court for the District of Mass for further proceedings in conformity with the opinion of this court. It is further ordered that the said appellants Francis X. Bellotti recover from William Baird et al, $3,352.80 and Jane Hunerwadel recover from William Baird $150.00 for their costs herein expended. cc/cl., Judges Aldrich, Julian.

August

4 Defendants' motion to enlarge time for filing a written response to plaintiffs' proposed questions for certification FILED CS.

9 Defendant-intervenors motion for enlargement of time for filing a written response to plaintiff's proposed questions for certification filed.

11 Intervenor's memorandum partially in opposition and partially in support of plaintiffs proposed questions, filed.

26 File returned to Supreme Court, Washington, D.C. at request of Clerk Gulickson per phone call of this date.

31 FREEDMAN, J. ORDER ENTERED . . . . the questions having been certified to the

August

31 Supreme Judicial Court of Massachusetts this day, it is hereby ordered that all briefs to the Supreme Judicial Court in support of the respective parties; positions should be filed with the Supreme Judicial Court no later than noon-time of Monday, September 20, 1976. cc/cl.

31 Certified questions and covering letter sent to Chief Justice Hennessey.

31 Copies to file, the Three Judge Court and counsel (without covering letter.) Original of certified questions impressed with the seal of the Court.

October

21 Letter dated Oct. 18 from Supreme Court of the U.S. stating . . . . "The Court today entered the following order in the above-entitled case: The motions to vacate order entered by Mr. Justice Brennan on July 30, 1976 are denied." Copies to Judges Aldrich, Julian.

1977

January

27 FREEDMAN, J. ORDER ENTERED . . . . A HEARING IN THIS THREE_JUDGE CASE WILL BE HELD ON Wednesday, Feb. 2, 1977 at 9:30 a.m. in Courtroom 3 on the 12th Floor on the sole issue as to whether or not a stay of enforcement of § 12P of MGL c. 112, inserted by St. 1974, c. 706, § 1 shall be

January

27 placed in effect, pending a resumption of a hearing on the merits. Copies to Judges Aldrich, Julian, counsel.

February

2 FREEDMAN, J., ALDRICH, J., JULIAN, J. three judge court hearing on sole issue re "stay of enforcement of 12P of M.G.L. c. 112 . . . pending a resumption of a hearing on the merits; plaintiff's motion for leave to file first amended complaint, filed.

2 Memorandum of law in support of motion to amend, filed. First amended complaint in class action, received for filing. Intervenors' memorandum in support of an order denying a stay of

February

2 enforcement of G.L. c. 112, Sec. 12P filed. Parties to file briefs by Feb. 7, 1977 at 10 a.m.; UNDER ADVISEMENT.

7 Defts' memorandum in opposition to plaintiffs' request for preliminary injunctive relief FILED CS. Copies to Judge Aldrich, Julian, Freedman.

7 Motion of the Civil Liberties Union of Mass. the Planned Parenthood League of Mass. Crittenden Hastings Clinic and Preterm, for leave to file a brief Amici Curiae FILED CS.

7 Brief of the Civil Liberties Union of Mass. the Planned Parenthood League of Mass. Crittenden Hastings Clinic and Preterm Amici Curiae filed.

February

9 The following impounded portions of the record returned from the U.S. Supreme Court: #4A Affidavits impounded; #26 Portion of the transcript starting with page 131 impounded. Impounded materials placed in Dep. Clerk Fagan's office.

10 ALDRICH, J., FREEDMAN, J. OPINION ON MOTION FOR STAY ENTERED . . . cc/cl.

10 ALDRICH, J., FREEDMAN, J. ORDER ENTERED . . . . following oral arguments and consideration of memoranda filed by the parties, and in accordance with an opinion filed this date, the Court orders that M.G.L. c. 112, § 12P be stayed until further order of the court. cc/cl.

February

10 JULIAN, J. DISSENT FROM ORDER OF THE MAJORITY OF THIS COURT ENTERED . . . . I dissent from the order of the majority of the Court entered this day which stays the enforcement of Mass. G.L. c. 112, 12P until further order of the Court. A statement of the reasons for may dissent will follow. cc/cl.

15 Certified copy of opinion of the Supreme Judicial Court, Comm of Mass.

18 JULIAN, SENIOR DISTRICT JUDGE . . . . DISSENTING OPINION ON MOTION TO STAY ENTERED . . .

22 Defendants' answer to plaintiffs' first amended complaint FILED CS.

February

22 Defendants' first set of intg to plaintiff William Biard FILED CS.

24 Copies of Opinion on motion for stay and dissenting opinion on motion to stay forwarded to West, Mass. Lawyers Weekly, NCAIR.

March

1 Ds' 1st set of interr for plaintiff Gerald Zupnick; filed. cs.

4 P's motion for pretrial hearing FILED CS.

7 Defendants' notice of opposition to plaintiffs' motion for pretrial hearing FILED CS.

8 Defendant Intervenor's answer to plaintiffs' first amended complaint filed cs.

March

9 ALDRICH, S.C.J., FREEDMAN, D.J. Conference re scheduling (no report) Counsel to report in writing re scheduling and discovery.(counsel present: Ms. Schmidt for pltfs', Mr. Cole for defts').

24 Ds' motion to dissolve prel. inj. and for sanctions, filed cs.

29 Ps' motion for leave to file answers and objections to ints out of time, filed. Copies to Judges Aldrich, Freedman and Julian.

29 Ps' memo in support of filing answers and objections out of time, filed. Copies to Judges Aldrich, Freedman and Julian.

March

29 Ps' motion for protective order filed cs.

30 Motion of Joan Schmidt to withdraw filed cs.

April

1 Motion to intervene as party plaintiff of Planned Parenthood League of Massachusetts, Phillip G. Stubblefield and Crittenton Hastings House & Clinic FILED CS.

1 Answers and objections to interrogatories to plaintiff Gerald Zupnick MD FILED.

1 Verification of complaint by plaintiff William Baird filed.

1 Verification of answers to interrogatories filed.

1 Verification of complaint by plaintiff Gerald Zupnick MD filed.

April

1 Verification of answers to interrogatories filed.

5 Motion of plaintiffs for summary judgment FILED CS.

5 Memorandum of law in support of motion of plaintiffs for summary judgment.

5 ALDRICH, C.J., JULIAN S.D.J. FREEDMAN, J. case called for three judge court hearing; pltfs' motion to file answers to intgs late, ALLOWED. Further hearing set for April 13, 1977 on motions to intervene on behalf of pltfs and defts; deft's motion for further answers to intgs and for the scheduling of hearing dates on summary judgment motions.

7 Deft motion of opposition to proposed intervenors' motion to intervene FILED cs.

April

8 Notice of change of appearance of S. Stephen Rosenfeld for defts filed, cs.

8 Notice of appearance of Thomas R. Kiley for defts filed cs.

12 Memorandum in support of motion to intervene FILED CS.

12 Defendants' initial statement of disputed material facts FILED CS.

13 Opposition of plaintiffs to motion to intervene by proposed plaintiff intervenors. filed cs.

13 Ds' memo in opposition to proposed intervenors' motion to intervene filed. c/s.

13 ALDRICH, GCS. JULIAN, S.J. Hearing on Motion of Planned Parenthood of Mass., Phillip Stubblefield, and the

April

13 Crittendon Hastings House and Clinic to intervene as party pltffs.; Mm. Henn argues for intervenors; Mr. Lucas for pltffs. in opposition to intervention; Mr. Stokey for Intervenors and Mr. Cole for the Comm. Notice of opposition to intervene filed by Comm; parties to get together and decide what kind of schedule they can agree on, then submit written schedule & perhaps there will be Pre-Trial Conference.

14 Appearance of Mr. Balliro as counsel for the plaintiffs, filed. c/s.

18 Atty. Roy Lucas's motion to withdraw as counsel for plaintiffs, filed. c/s.

April

21 FREEDMAN, J. Motion to withdraw appearance ALLOWED. Copies to counsel.

21 FREEDMAN, J. ALDRICH, SCJ, JULIAN, SCJ Motion to intervene of proposed plaintiff intervenors, DENIED, permit proposed intervenors to be recognized as amicci, all copies to Mr. Henn, in the future. Copies to counsel.

May

20 Defts' motion to compel plaintiff Zupnick to answer defts Intgs concerning expert witnesses by a date certain filed cs (See entry on Docket #6-date of May 23, 1977).

20 Defts' Motion to compel plaintiff William Baird to answer Defts Intgs

May

20 concerning expert witnesses by a date certain filed cs. (See entry on Docket #6-date of May 23, 1977)

20 Defts' motion to compel plaintiff William Baird to answer their intgs filed cs. (See entry of Docket #6-date of May 23, 1977).

20 Defts' motion to compel plaintiff Gerald Zupnick to answer their intgs filed cs. (See entry on other side of docket).

23 Defts' first set of intgs to plaintiff Willaim Baird FILED CS.

23 Defts' first set of intgs to plaintiff Gerald Zupnick FILED CS.

23 New certificate of service as to filings of May 20, 1977 filed.

June

3 Defts' second set of intgs to plaintiff Gerald Zupnick FILED cs. Defts' second set of intgs to plaintiff William Baird filed cs.

7 Motion for an order compelling plaintiffs to reimburse defendants for the cost of their appeal to the Supreme Court of the U.S. FILED CS.

14 Defts' initial request for the production of documents by plaintiff William Baird FILED CS.

15 FREEDMAN, J. ALDRICH, SCJ, JULIAN, SJ. Order entered requiring ps to comply with Supreme Court of the US dated 8/2/76, filed.

22 Plaintiffs' first set of intgs to deft Jane Hunerwadel FILED CS.

June

22 Plaintiffs' first set of intgs to deft Francis X. Bellotti FILED CS.

22 Answers to defendants' second set of intgs to plaintiff William Baird FILED CS.

22 Answers to defendants' second set of intgs to plaintiff Gerald Zupnick MD FILED CS.

22 Supplementation of answers to intgs to plaintiff William Baird FILED CS.

July

7 Defts' motion for sanctions under F.R.C.P. 37(b) and for an order permitting them to take discovery of plaintiffs' experts by other means FILED CS.

7 Defts' memorandum in support of their motion for sanctions and an order

July

7 permitting them to take further discovery of plaintiffs' experts FILED CS.

7 Affidavit of Garrick F. Cole in support of defendants' motion for sanctions and an order permitting them to take further discovery of plaintiffs' experts FILED CS.

7 FREEDMAN, J. Re deft motion for sanctions. It is ordered that plaintiffs respond to this motion within fourteen (14) days from date of this order.

****

May

23 FREEDMAN, J. ORDER ENTERED . . . the Court orders that plaintiff Gerald Zupnick answer defts intgs #14 completely on or before June 30, 1977. cc/cl.

May

23 FREEDMAN, J. ORDER ENTERED . . . . the Court orders that plaintiff Wm. Baird answer defts' intg #14 completely on or before June 30, 1977. cc/cl.

23 FREEDMAN, J. ORDER ENTERED . . . the Court orders that Pltf William Baird shall answer completely and without further objections the following of defts intgs, 2, 4, 9, 19, 11, 12 and 13, (2) pltf William Baird shall serve and file his answers to the interrogatories on or before June 15, 1977. cc/cl.

23 FREEDMAN, J. ORDER ENTERED . . . the Court orders that plaintiff Gerald Zupnick shall answer completely and without further objection

May

23 the following of defts' intgs 2, 4, 7 and 8.; and 2. Plaintiff Gerald Zupnick shall serve and file his answers to the intgs ennumerated above on or before June 15, 1977. cc/cl.

July

11 Plaintiffs' response to the defendant's initial request for the production of documents by William Baird and Gerald Zupnick FILED CS.

13 ALDRICH, S.C.J., JULIAN, S.D.J., FREEDMAN, J. ORDER ENTERED . . . . pre-trial of above entitled case scheduled for Monday, August 22, 1977 in Courtroom 3, 12th Fl. at 11:00 a.m. This will include the scheduling of trial to follow sometime

July

13 in the fall. Accordingly, all pre trial discovery will be completed by Friday, August 19, 1977. This deadline will not be extended unless it becomes clear that one of the parties has not been cooperative in arranging the necessary witnesses for the taking of depositions. cc/cl.

18 Ps' oppcsition to defts' motion for sanctions and for an order permitting them to take discovery of plaintiffs' experts FILED cs.

18 Second supplementation of answers to intgs to plaintiff Wm. Baird filed cs.
Verification of second set of supplemental answers to intgs.

July

25 Deft. responses to p's first set of interrogatories. FILED cs. (See docket #7 for further entries of July 18th and 25th.

18 Supplementation of answers to intgs to plaintiff Gerald Zupnick FILED cs.
Verification of supplemental answers to intgs.

20 FREEDMAN, J. ORDER ENTERED . . . . defts have moved this court permit defts to take further discovery of plaintiffs' expert witnesses . . and to impose sanctions upon plaintiffs . . . . defts' motion to take depositions of plaintiffs experts is allowed. Motion for sanctions denied. cc/cl.

25 Stipulation concerning effect of deft discovery and plaintiffs' responses FILED (ASSENTED TO) CS.

July

29 Defts' notice of taking deposition of CAROL NADELSON, M.D. FILED CS.

August

1 Defendants' motion for leave to contact members of plaintiff class FILED CS.

1 Defts' motion to shorten time allowed plaintiffs to respond to request for admissions FILED CS.

1 Defts' first set of requests for admissions to plaintiff Gerald Zupnick FILED CS.

2 Defts' motion for an order shortening the period of notice for their motion for sanctions under F.R.C.P. 37 FILED.

2 Affidavit of Michael B. Meyer in support of defts' motion for sanctions under F.R.C.P. 37 filed.

August

2 Defts' motion for sanctions under rule 37 FILED.

2 FREEDMAN, J. Re Defts' motion for leave to contact members of plaintiff class - "DENIED." (after conferring with Julian, J.) cc/cl.

2 FREEDMAN, J. Re defts' motion to shorten time allowed plaintiffs to respond to request for admissions - "ALLOWED." (After consulting with Julian, J.) cc/cl.

2 FREEDMAN, J. (no court reporter) Appearance of Rikki J. Klieman Esq. for plaintiff, filed. Plaintiffs' opposition to defts' motion for leave to contact member of class, filed. Plaintiffs' motion in opposition to shorten

August

2 time to request admissions, filed. Arguments; motion to contact class denied; shorten time for admissions, allowed. Court sets schedule for taking depositions of expert witnesses.

8 First amendment to d's first set of requests for admissions to ptf Gerald Zupnick, filed.

10 Notice of taking deposition of Joy Dryfoos on 8/18/77, filed. cs.

11 Defts' motion for an order permitting this Court's stenographer to provide defendants with a transcript of this Court's hearing on several motions in March 1977 FILED CS.

August

11 Defts' fourth motion for sanctions under F.R.C.P. 37 for plaintiffs' failure to respond to discovery under F.R.C.P. 26(b)(4). FILED CS.

11 Defts memorandum in support of their fourth motion for sanctions under F.R.C.P. 37 for plaintiffs failure to respond to discovery under F.R.C.P. 26(b)(4) FILED CS.

12 P's motion in opposition to defendants' fourth motion for sanctions FILED CS.

15 Defts' first supplemental responses to plaintiffs' first set of intgs FILED CS.

16 Ps' motion to shorten time allowed Ds and Ds-Intervenors to respond to requests for admissions.

16 Ps' motion for a protective order FILED CS.

August

16 Ps' first requests for admissions filed.

17 Ds' motion for a protective order relieving them of their obligation to respond to plaintiffs' first requests for admissions FILED CS.

17 Ds' notice of opposition to plaintiffs' motion to shorten time allowed defendants and defendant-intervenors to respond to requests for admissions FILED CS.

17 Ds' notice of opposition to plaintiffs' motion for a protective order FILED CS.

*** 16 FREEDMAN, J. Re Ps' motion for protective order - "On the basis of plaintiffs' attempted use of Mrs. Dryfoos' testimony,

August

16 plaintiffs motion for a protective order is allowed." cc/cl.

19 DEPOSITION OF CAROL C. NADELSON FILED.

19 CONTINUED DEPOSITION OF CAROL C. NADELSON FILED.

19 Answers of the plaintiff Gerald Zupnick to defts' request for admissions of fact FILED CS.

19 Defts' initial pre trial memorandum FILE CS.

22 Ds' motion to determine the sufficiency of ps' responses to ds' request for admissions, filed. c/s.

Ds' memo in support of motion to determine answers, filed. c/s.

* 19 Deft-intervenor's objections to request for admissions, filed. c/s.

*August

19 Deft., Jane Hunerwadel's responses to pltff's first set of interrogatories, filed.

22 FREEDMAN - JULIAN, D.J. Amici Planned Parenthood memorandum of pre-trial conference, filed. Hearing on pre-trial conference. Court extends discovery re: Dr. Nadelson to Sept. 14. Orders that all outstanding motions are denied. Three-Judge Court non-jury trial Monday, Oct. 17, 1977 at 10:00 a.m.; pre-trial briefs by Oct. 12. (no later than 10/14)

September

1 Motion to amend the answers of the plaintiff Gerald Zupnick to defts request for admissions FILED CS.

September

1 Ps' response to defts' motion to determine the sufficiency of pltfs' responses to defts' first set of requests for admissions by pltf Gerald Zupnick FILED CS.

1 Ps' request to notice facts FILED CS.

9 Defts' opposition to plntffs' motion to amend answers of Plntff Zupnick to defts' request for admissions and of defts' opposition to plntffs' request to notice facts, filed. c/s. Copies to Aldrich, C.J., Julian, S.D.J., and Freedman, D.J.

14 Third supplementation of answers to ints to plntff Wm. Baird, filed.

14 Plntff's motion to enlarge time for the taking of deposition of Joy Dryfoos by the defts, filed.

September

14 Deft-Intervenor's Notice of Opposition to Plaintiff's request to Notice Facts, filed, c/s.

14 Deft-Intervenor's answer to plntffs' first request for admissions, filed, c/s.

15 Defts' responses to plaintiffs' requests for admissions, filed.

15 Defts' request for allowance of their motion to determine the sufficiency of plntffs' responses to defts' first set of requests for admissions, filed.

21 Defts' motion to strike plaintiffs' third supplementation of answers to interrogatories to plaintiff William Baird FILED CS.

September

21 Defts' motion to strike plaintiffs' proposed witness Dryfoos FILED cs.

21 Defts' opposition to plaintiffs' motion to enlarge time for the taking of the deposition of Ms Dryfoos by the defendants FILED CS.

23 FREEDMAN, J. Re Ps' request to notice facts - "DENIED."

23 FREEDMAN, J. Re motion to enlarge time for the taking of the de position of Joy Dryfoos by the defts - "Allowed until Oct. 5, 1977 for purpose of defendant taking Mrs Dryfoos' deposition. No further extensions to be allowed. Parties to cooperate on a date and time for purposes of completing this deposition." cc/cl.

October

5 Affidavit of Michael B. Meyer concerning the deposition of Ms. Joy Dryfoos FILED CS.

11 Continued deposition of Dr. Carol C. Nadelson, third day FILED.

12 Ps' trial brief FILED CS.

13 Intervenor's pre trial memorandum FILED CS.

13 Motion of Planned Parenthood League of Massachusetts, Crittenden Hastings Clinic and Preterm. Amicae Curiae to participate in oral argument FILED CS.

13 Brief of Planned Parenthood League of Massachusetts, Crittenden Hastings Clinic and Preterm, Amicae Curiae FILED.

14 Letter dated Oct. 14, 1977 from Mr. Henn re insertion of wrong name - Phillip G.

October

14 Stubblefield MD rather than Preterm.

14 Deft's pre trial memorandum FILED CS.

17 ALDRICH, C.J., JULIAN, S.D.J., FREEDMAN, J. Affidavit of Joan C. Schmidt and Joseph J. Balliro concerning the deposition of Ms Joy Dryfoos filed. Hearing on deft's request to determine the sufficiency of plaintiffs responses to first set of admissions - "all stand admitted until instance by instance showing can persuade otherwise". Defts motion to strike plaintiffs third supplementation of answers to intgs of Wm. Baird - "withdrawn". Defts' motion to strike plaintiffs'

October

17 proposed witness Dryfoos - withdrawn. Three judge court non-jury trial on the merits begins; evidence; contd to 10/18.

18 ALDRICH, C.J., JULIAN, S.D.J., FREEDMAN, J. Three-judge court trial continues - second day; evidence; plaintiffs memorandum of law in support of admission of "11 Million Teenagers" filed. Plaintiff rests; defts evidence; stipulation filed; deft rest. Court directs plaintiff to file within 7 days its arguments of objections to request for admissions; deft has three days thereafter to respond; briefs on the law to be filed three weeks after

October

18 court files its rulings on admissions. Further briefs may be requested upon motion.

26 Memorandum opposing defts' motion that defendants' request for admissions be deemed admitted FILED CS.

28 Defts' memorandum in opposition to plaintiffs' and Amici's motion to exempt certain requests for admissions by Gerald Zupnick from the Court's order of October 17, 1977 FILED CS.

31 Amendments to defts' memorandum in opposition to plaintiffs' and Amici's motion to exempt certain requests for admissions by Gerald Zupnick from the Court's order of October 17, 1977 FILED cs.

November

1 Court reporter's transcripts of proceedings of October 17th and 19th 1977 filed.

10 Letter dated Nov. 9, 1977 from Asst. Atty. Gen. Meyer attaching copy of letter to Mr. Balliro dated Nov. 9, 1977 re: G.L. § 12S.

17 Letter dated Nov. 16, 1977 from Mr. Balliro to Mr. Meyer in response to Mr. Meyer's letter of Nov. 10, 1977.

18 Copy of letter dated Nov. 17, 1977 from Mr. Meyer to Mr. Balliro.

21 Defts' response to the Court's order of Nov. 14, 1977 FILED CS.

21 Copy of letter Nov. 18, 1977 from Mr. Henn to Mr. Meyer re Amici's position re § 12S.

November

28 Defts' motion for an order compelling plaintiffs to comply with the Court's suggestion of October 19, 1977 that plaintiffs define the relationship between their claims and the statutes inclusion of "minors who are incapable of consenting" FILED CS.

29 Copy of letter dated Nov. 28, 1977 from Mr. Balliro to Mr. Meyer re MGL c. 112 § 12S.

29 ALDRICH, SJC, JULIAN, SDJ, FREEDMAN, D.J. Memorandum and order entered . . . . in response to defts' motion for compliance filed 11/28/77 and a review of the record, the court agrees with defts that Mr. Balliro letter of Nov. 16, 1977 is not altogether clear. It

November

29 does find Mr. Henn's letter of Nov. 18 to be clear and adequate. Mr. Balliro is ordered to make further response, within five days of the date hereof.

30 Ps' opposition to defts' motion for an order compelling plaintiffs to comply with the Court's suggestion of October 19, 1977 that plaintiffs define the relationship between their claims and the status inclusion of "Minors Who Are Incapable of Consenting". Filed cs.

December

5 Defts' motion to extend time for filing of briefs FILED CS.

5 Ps' further response to the order of the Court dated Nov. 29, 1977 FILED CS.

December

6 FREEDMAN, J. Re motion to extend time for filing of briefs - "ALLOWED". cc/cl.

9 Intervenor's post-trial memorandum of law, filed cs.

12 Pltfs' post trial brief, FILED. cs.

12 Defts' motion to dissolve or in the alternative to modify the preliminary injunction entered by the court on Feb. 10, 1977, FILED.

12 Defts' initial post-trial brief, FILED. cs.

20 Pltfs' opposition to defts' motion to dissolve or in the alternative modify the preliminary injunction entered by the Court on Feb. 10, 1977, FILED. cs.

23 Letter dated Dec. 23, 1977 from Mr. Henn, counsel for amici, stating that Amici

December		
23		does not intend to file response to defts' post-trial brief FILED CS.
29		BY THE COURT, Austin W. Jones Jr. Deputy Clerk ORDER ENTERED . . . . defts have moved to dissolve the preliminary injunction entered by this Court on Feb. 10, 1977 enjoining them from enforcing MGL ch. 112, § 12P or in the alternative, to modify the injunction by enjoining enforcement of the statute only insofar as it applies to mature minors in the first trimester. The Court denies the defts' motion. Judge Julian dissents from this denial. cc/cl.
29		Amici's motion for leave to file responsive letter to

December		
29		defts' post-trial brief FILED CS.
30		Defts' opposition to the circulation of Amici's letter of Dec. 23, 1977 FILED CS.
1978		
January		
5		For distribution, article entitled "Induced Abortion and Subsequent Outcome of Pregnancy in a Series of American Women." filed.
5		FREEDMAN, J. ORDER ENTERED re article received 1/5/78. ". . . all copies of the letter and article submitted . . . and circulated . . . are being returned to counsel and will not be considered by the Court." cc/cl.

May		
2	ALDRICH, SCJ, FREEDMAN, D.J.	OPINION ENTERED . . . . we reaffirm our decision that the statute is unconstitutional and is to be permanently enjoined. Pltfs are entitled to costs, including recovery of costs paid as a result of the previous appeal, lost because of defts' mistaken advocacy. cc/cl.
2	ALDRICH, SCJ, FREEDMAN, D.J.	ORDER ENTERED . . . . in accordance with our opinion of May 2, 1978, section S of M.G.L. c. 112 and such other portions of the chapter insofar as they make specific reference thereto are hereby declared to be unconstitutional and void, and defts are enjoined from

May		
2		enforcement thereof. cc/cl, West, Mass. Lawyers Weekly, NCAIR.
2	JULIAN, S.D.J.	DISSENTING OPINION ENTERED . . . . for the reasons stated in this and in my previous dissenting opinion, I would uphold the constitutionality of the statute. cc/cl, West, Mass. Lawyers Weekly, NCAIR.
11		Motion to intervene as party plaintiffs of Planned Parenthood League of Mass, Crittenton Hastings House & Clinic and Phillip G. Stubblefield FILED CS.
11		Memorandum of Planned Parenthood League of Mass et al in support of motion to intervene filed.

May

15 FREEDMAN, D.J. Motion to intervene is allowed without prejudice to the Supreme Court's discretion with respect to oral argument.

19 D's motion for reconsideration, filed. c/s.

22 Ps' motion to vacate order of the court dated May 15, 1978 filed CS.

22 Ps' motion in opposition to motion to intervene as party plaintiffs of Planned Parenthood League of Massachusetts, Crittenton Hastings House & Clinic and Phillip G. Stubblefield FILED.

22 Memorandum of law in support of plaintiffs' motion in opposition to motion to intervene as party plaintiffs of Planned

May

22 Parenthood League of Massachusetts, Crittenton Hastings House & Clinic and Phillip G. Stubblefield FILED CS.

22 Letter dated 5/22/78 from Mr. Henn to Clerk Fagan re plaintiff intervenors Planned Parenthood League of Mass et al not opposing the issuance of an order giving the A.G. 7 to 10 days or so to file substantive papers opposing this Court's allowance of the motion to intervene.

24 Plaintiff-Intervenors' opposition to plaintiffs' motion to vacate order of May 15, 1978 FILED CS.

25 Deft-Intervenor Hunerwadel's motion to correct order FILED CS.

May

25 FREEDMAN, J. ORDER ENTERED . . . by motion dated May 11, 1978 Planned Parenthood et al sought to intervene in this action. The motion was allowed by this individual judge by Order dated May 15, 1978 as inscribed on the face of the motion itself. Said Order of this individual Judge is hereby vacated. The parties are allowed ten (10) days from this date, May 25, 1978 to file any oppositions to the motion to intervene. cc/cl.

June

6 Defts' notice of opposition to Planned Parenthood's motion to intervene FILED CS.

19 ALDRICH, S.C.J., FREEDMAN, D.J. ORDER ENTERED . . . . it is hereby ordered

June

19 that the motion to intervene as party pltfs filed May 11, 1978 by Planned Parenthood, Crittenton Hastings House & Clinic and Phillip G. Stubblefield, be ALLOWED. cc/cl.

19 JULIAN, S.D.J. (Dissenting) I would deny the motion to intervene. cc/cl.

21 Defts' request that the Court act upon all outstanding motions filed cs.

*** 20 ALDRICH, C.J., FREEDMAN, D.J. AMENDED ORDER ENTERED . . . amending order of May 2, 1978 in accordance with our opinion of May 2, 1978 Section 12S of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby declared

June

*** 20 to be unconstitutional and void, and defts are enjoined from enforcement thereof. cc/cl.

22 Pltfs' motion for payment of expert witnesses filed with affidavit in support and cs.

26 Defts Bellotti et al Notice of Appeal to the Supreme Court filed. cs.

26 Deft-Intervenor Jane Hunerwadel Notice of Appeal to the Supreme Court filed. c/s.

July

5 D's notice of opposition to P's motion for payment of expert witness, filed. c/s.

18 FREEDMAN, J. ORDER ENTERED . . . . in accordance with the Court's order of July 20, 1978, pltf has filed a motion for payment of $450

July

18 for expert witness . . deft has filed a notice of opposition and has offered to pay what it regards as a reasonable fee in the amount of $214 . . . . the Court believes the amount of $350 is fair and reasonable . . . so ordered. cc/cl.

August

2 Certified copy of docket entries and Notices of Appeal forwarded to the U.S. Supreme Court, Washington, D.C.

October

30 Certified copy of Order, Supreme Court of the U.S. dated October 30, 1978 . . . . "statement of jurisdiction in this case having been submitted and considered by this court,

October 30 probable jurisdiction is noted. The case is consolidated with No. 78-329 and a total of one hour is alloted for oral argument."

United States District Court.
District of Massachusetts.

[Title omitted in printing]

First Amended Complaint in Class Action for Temporary Restraining Order, Preliminary and Permanent Injunctions, and Declaratory Judgment Against Unconstitutional Requirementof Parental or Judicial Consent for Abortion.

Plaintiffs reallege and incorporate by reference each and every allegation of the original complaint and further state:

1. This is a civil action for a declaratory judgment, a temporary restraining order, preliminary, and permanent injunctions prohibiting enforcement of the parental or judicial consent requirement for a minor's abortion, Gen. Laws, ch. 112,

Sec. 12P, enforced by Defendants, and recently construed by the Supreme Judicial or judicial court of this Commonwealth.

2. The parental consent requirement, as so construed, unconstitutionally restricts the performance of abortions in violation of the principles set out in Planned Parenthood v. Danforth, 428 U.S. ___ (1976); Roe v. Wade, 410 U.S. 113 (1973), Doe v. Bolton, 410 U.S. 179 (1973), and Eisenstadt v. Baird, 405 U.S. 438 (1972).

3. The parental consent rule will inflict grave and irreparable injury upon Plaintiffs and minor women, and must be enjoined, because it burdens, limits, and in many instances precludes access to medical abortion procedures in Massachusetts, arbitrarily discriminates against a single class of medical procedures and

patients, and abridges fundamental personal constitutional rights protected by the Fourteenth Amendment.

II. JURISDICTION

4. Jurisdiction is conferred by Act of Congress, 28 U.S.C. Sec. 1343(3), 1331, and relief authorized by Sec. 1 of the Enforcement Act of 1871, currently 42 U.S.C. Sec. 1983, and the Declaratory Judgment Act, 28 U.S.C. Sec. 2201.

5. In order to avoid action by Defendants, Plaintiffs must apply to this Court for a temporary restraining order, to prevent grave and immediate irreparable injury.

6. A three-judge district court must hear the prayers for preliminary injunctive relief, as required by 28 U.S.C. secs. 2281, 2284, which were in force when this action was brought.

III. PARTIES

7. Plaintiff WILLIAM BAIRD is a resident and citizen of the State of New York.

8. Plaintiff MARY MOE was a pregnant minor under the age of 18 when this action was brought, and a resident and citizen of the Commonwealth of Massachusetts.

9. Plaintiff GERALD ZUPNICK, M.D., is a resident and citizen of the State of New York.

10. Plaintiff PARENTS AID SOCIETY, INC., at the time this action originated, was a Chapter 180 not-for-profit corporation organized under the laws of the Commonwealth of Massachusetts, with prinicipal offices at 673 Boylston Street, Boston, Massachusetts. Plaintiff BAIRD was and is an officer and director of the corporation.

11. Defendants are all residents and citizens of the Commonwealth of Massachusetts.

12. This action has previously been certified by the Court as a class action as to the plaintiffs and defendants.

IV. STATUTORY PROVISION IN QUESTION

13. "Section 12P. (1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary ...."

V. FACTS

14. Plaintiff WILLIAM BAIRD is general director and chief-counselor of a center operated by Plaintiff PARENTS AID SOCIETY, INC., for the purposes, inter alia, of providing

contraception, abortion, counseling VD diagnosis and treatment, adoption referral, and other services.

15. Plaintiff MARY MOE was sixteen years of age at the time of filing, in the tenth grade, and about nine weeks pregnant. She was seeking to terminate her pregnancy, and did not want to inform either of her parents.

16. The statute in question would have prevented her from obtaining an abortion without parental or judicial consent, and there-by inflicted grave and irreparable injury upon her.

17. Plaintiff GERALD ZUPNICK, M.D. is a physician licensed to practice medicine in eight (8) states, including Massachusetts and New York. Dr. Zupnick is medical director of the center.

18. Plaintiff Bill Baird has for over ten years been a nationally prominent leader in the social movement to invalidate restrictions on abortion

and birth control services in the United States. He was the successful party in the landmark case of Eisenstadt v. Baird, 405 U.S. 438 (1972). He has lectured on hundreds of college and university campuses, been Clinical Director of Emko Co. (a contraceptive manufacturer), been a special advisor to the New York State Senate Committee on Health, and was founder of Parents Aid Society, the first non-profit abortion/birth control center in the United States.

19. Dr. Zupnick has extensive experience in providing abortion, contraception, and related services on an outpatient basis, and has performed over 8,000 abortions in a non-hospital setting.

20. With Bill Baird as Administrator and Dr. Zupnick as Medical Director, Parents Aid Society, Inc. has endeavored to facilitate access to abortion services with

particular emphasis on helping the poor and very young.

21. The parental or judicial consent requirement, however, threatens the continued activities of Plaintiffs by imposing sanctions upon the treatment of minors without parental or judicial consent.

22. The statute as construed in Baird v. Attorney General, ___ Mass. ___, ___ N.E.2d ___ (Jan. 25, 1977)(SJC - 763), requires prior notice to parents in every case of judicial proceeding, regardless of probable predictable consequences, and is overbroad.

23. The statute as construed requires that either parent or court take into account only "the best interests" of the minor. This standard is so vague and overbroad as to provide insufficient protection to the minor's constitutionally protected right of privacy.

24. The statute as construed gives final word to a Superior Court judge to determine "that the best interests of the minor will not be served by an abortion," Slip Op. p. 9, and therefore burdens a minor's rights by allowing standardless overriding of a patient's informed consent supported by a medical judgment as to necessity.

25. The statute as interpreted places significant burdens on a minor's access to abortion.

26. Such restraints, unless enjoined, will operate to deny many minor women access to medical care and counseling.

27. Defendants are empowered to and will enforce the statute through civil and criminal sanctions.

28. Injunctive relief is necessary to prevent enforcement.

VI. CLAIMS FOR RELIEF

(1) The parental or judicial consent requirement, as interpreted, is invalid under the Due Process Clause of the Fourteenth Amendment.

(2) The parental or judicial requirement, as interpreted, violates the Equal Protection Clause of the Fourteenth Amendment, particularly in light of Mass. Gen. Laws Ch. 112, ¢12F.

VII. JUDGMENT REQUESTED

WHEREFORE, PLAINTIFFS RESPECTFULLY REQUEST:

(1) A temporary restraining order prohibiting Defendants from enforcing or otherwise implementing the parental consent requirement of the new Massachusetts abortion law, Gen. Law, Ch. 112 Sec. 12P.

(2) A declaratory judgment that the parental or judicial consent requirement violates the Due Process and Equal Protection Clauses of the

Fourteenth Amendment as interpreted by Planned Parenthood v. Danforth, 428 U.S. ___ (1977), Roe v. Wade, 410 U.S. 113 (1973), Doe v. Bolton, 410 U.S. 179 (1973), and Eisenstadt v. Baird 405 U.S. 438 (1972).

(3) Preliminary and permanent injunctins prohibiting Defendants from enforcing or otherwise implementing the parental consent requirement.

(4) An order taxing all costs and reasonable attorneys' fees against Defendants, and granting Plaintiffs any other relief deemed necessary, just, or proper.

RESPECTFULLY SUBMITTED:

Roy Lucas
Suite 604
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 338-6955

Joan C. Schmidt
One Center Plaza
Boston, MA 02108
(617) 723-1980

ATTORNEY FOR PLAINTIFFS.

Dated: February 1, 1977

[Title omitted in printing]

DEFENDANTS' ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendants Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts, and the district attorneys of the Commonwealth (the defendants) respond to the allegations contained in the numbered paragraphs of the first amended complaint as follows:

1. The allegations contained in paragraph one concern the nature of the action and require no answer.

2. The allegations contained in paragraph two are conclusions of law requiring no answer.

3. The allegations contained in paragraph three are a mixture of conclusions of law requiring no answer and factual allegations. Insofar as

the paragraph contains factual allegations, they are denied.

4. The allegations contained in paragraph four are conclusions of law requiring no answer. Further answering, defendants state that neither 42 u.S.C. §1983 nor 28 U.S.C. §2201 confers subject matter jurisdiction on this Court.

5. Defendants deny that their enforcement of the statute would cause plaintiffs "grave and irreparable injury." Defendants admit that, absent an order of this Court invalidating it, they will enforce the statute.

6. The allegations contained in paragraph six are conclusions of law requiring no answer.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. The allegations contained in paragraph twelve are conclusions of law requiring no answer.

13. The allegations contained in paragraph thirteen are conclusions of law requiring no answer.

14. Admitted.

15. Admitted.

16. The allegations contained in paragraph sixteen are conclusions of law requiring no answer.

17. Admitted.

18. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations contained in the first and third sentences of paragraph eighteen. The allegations contained in the second sentence are admitted.

19. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph nineteen.

20. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph twenty.

21. Denied.

22. The allegations contained in paragraph twenty-two are conclusions of law requiring no answer.

23. The allegations contained in paragraph twenty-three are conclusions of law requiring no answer.

24. The allegations contained in paragraph twenty-four are conclusions of law requiring no answer.

25. The allegations contained in paragraph twenty-five are a mixture of conclusions of law requiring no answer and factual allegations. Insofar as the paragraph contains factual allegations, they are denied.

26. The allegations contained in paragraph twenty-six are a mixture of conclusions of law requiring no answer

and factual allegations. Insofar as the paragraph contains factual allegations, they are denied.

27. The allegations contained in paragraph twenty-seven are a mixture of conclusions of law requiring no answer and factual allegations. Insofar as the paragraph contains factual allegations, they are denied.

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted, because:

1. Mass. Gen. Laws Ann. ch. 112, §12P (West Supp. 1976)(the statute) does not violate the due process clause of the Fourteenth Amendment because

   a. The statute is properly to protect the best interests of minors and does not infringe upon or unduly burden the contitutional

right of girls under eighteen years of age to have access to competent abortion services; and

b. the statutory decision-making standard of a minor's "best interests" is a well-established legal concept which is neither unconstitutionally vague nor overbroad and whose use by parents and the Superior Court does not adversely affect the constitutional rights of minors who seek either parental consent or judicial authorization to obtain an abortion.

2. The statute when read in conjunction with Mass. Gen. Laws Ann. ch. 112, §12F (West Supp. 1976) does not violate the equal protection clause

of the Fourteenth Amendment because the decision to obtain abortion services is fundamentally different from other patient-initiated medical decisions and the Commonwealth has a compelling interest in permitting minors to consent to the provision of a wide range of medical services without parental consultation while requiring parental consultation in the case of abortions.

WHEREFORE, defendants request that the Court dismiss plaintiffs' amended complaint or, in the alternative, enter judgment in their favor, and allow them their costs.

By their attorneys,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Garrick F. Cole
Assistant Attorney General
Government Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1004

Dated: February 18, 1977

[Title omitted in printing]

DEFENDANT-INTERVENOR'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT.

Defendant-intervenor restates and incorporates by reference each and every defense, response and counterclaim raised in the original answer.

FIRST DEFENSE

The plaintiffs' first amended complaint fails to state a claim upon which relief can be granted because G.L. c.112, sec. 12P, as construed by the Supreme Judicial Court of the Commonwealth of Massachusetts, is narrowly drawn to protect the best interests of minor, unmarried girls and thus, is constitutional on its face.

SECOND DEFENSE

The defendant-intervenor responds to the allegations made in the plaintiffs' first amended complaint as follows:

1. The defendant-intervenor neither admits or denies the allegations contained in paragraph 1.

2. The defendant-intervenor denies the allegations contained in paragraph 2.

3. The defendant-intervenor denies the allegations contained in paragraph 3.

4. The defendant-intervenor neither admits or denies the allegations in paragraph 4.

5. The defendant-intervenor denies the allegations in paragraph 5.

6. The defendant-intervenor neither admits or denies the allegations in paragraph 6.

7. The defendant-intervenor has no knowledge as to the truth or

falsity of the allegations contained in paragraph 7.

8. The defendant-intervenor has no knowledge as to the truth or falsity of the allegations contained in paragraph 8.

9. The defendant-intervenor has no knowledge as to the truth or falsity of the allegations contained in paragraph 9.

10. The defendant-intervenor has no knowledge as to the truth or falsity of the allegations contained in paragraph 10 and further denies that Baird "was and is an officer and director of the corporation."

11. The defendant-intervenor admits the allegations in paragraph 11.

12. The defendant-intervenor admits the allegations in paragraph 12 and further states that the action was certified by the court as a class action with respect to the defendant-intervenor.

13. The defendant-intervenor admits the allegations in paragraph 13.

14. The defendant-intervenor neither admits or denies the allegations of paragraph 14.

15. The defendant-intervenor neither admits or denies the allegations of paragraph 15.

16. The defendant-intervenor denies the allegations of paragraph 16 and further alleges that Mary Moe may have suffered irreparable harm as a result of her failure to obtain proper follow-up care.

17. The defendant-intervenor admits that as of January, 1975, Dr. Zupnick was licensed to practice medicine in the Commonwealth of Massachusetts and denies that Dr. Zupnick was or is the medical director of the center. By his own testimony he was a contract physician employed by the center.

18. The defendant-intervenor admits that Baird was a party in the case of Eisinstadt v. Baird, and moves to strike all other allegations in this paragraph as immaterial, self-serving or both.

19. The defendant-intervenor neither admits or denies the allegations of paragraph 19.

20. The defendant-intervenor denies the allegations of paragraph 20.

21. The defendant-intervenor denies the allegations of paragraph 21.

22. The defendant-intervenor denies the allegations of paragraph 22.

23. The defendant-intervenor denies the allegations of paragraph 23.

24. The defendant-intervenor denies the allegations of paragraph 24.

25. The defendant-intervenor denies the allegations of paragraph 25.

26. The defendant-intervenor denies the allegations of paragraph 26.

27. The defendant-intervenor denies the allegations of paragraph 27.

28. The defendant-intervenor denies the allegations of paragraph 28.

WHEREFORE, defendant-intervenor respectfully requests that the Court dismiss plaintiffs' first amended complaint or, in the alternative, enter judgment in her favor and allow them their costs.

By her attorneys,

Brian A. Riley

and

Mary Laura Russell
Suite 524
40 Court Street
Boston, Massachusetts 02108
(617) 523-3240

[Title omitted in printing]

MOTION OF PLAINTIFFS FOR SUMMARY JUDGMENT

Plaintiffs resepctfully move this Court for summary judgment declaring the parental consent requirement of Massachusetts G.L. c. 112, §12P, as construed, unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment. In support of this motion, Plaintiffs state:

1. This Court compiled an extensive and thorough record in the proceedings which resulted in the first edition on the merits, Baird v. Bellotti, 393 F. Supp. 847 (D. Mass. 1975).

2. This Court found many factual matters to be established in that opinion, and these appear, upon

further review and study, to be sufficient to warrant a summary judgment in the case as it presently stands.

3. While further evidence may be informative, Plaintiffs believe that sufficient facts are in the record to justify the present motion now. These facts, taken from the opinion, are as follows:

4. "Plaintiff Mary Moe is an unmarried minor residing at home with her parents in Massachusetts. At the time of the institution of the action she was 16 years of age and about 8 weeks pregnant. She has not informed her parents of her condition and does not wish to." 393 F. Supp. at 850.

5. "Her reasons for not informing her parents were in part apprehension of what

might happen to her as a result of their learning she had had intercourse, in part the fear of what would happen to her boy friend, and in part the desire to spare her parents' feelings." 393 F. Supp. at 850.

6. "We find that she is fairly representative of a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents." 393 F. Supp. at 850.

7. "In connection with Mary Moe's capacity to represnt a plaintiff class, F.R.Civ.P. 23(a)(4), we find, following examination and cross-examination in camera,

that she is of average intelligence and awareness; that her emotional age at least corresponds with her chronological age, and that she had made a considered decision, before she learned of her pregnancy, that in case of pregnancy she would seek to abort, and that she was competent to make and effectuate that decision." 393 F. Supp. at 850.

8. "Plaintiff William Baird is the founder and director of plaintiff Parents Aid. He describes himself as being, among other things, a pioneer and advocate for the free availability of abortions. He has a strong personal interest in that sense, but no financial or other tangible concern." 393 F. Supp. at 851.

9. "Plaintiff Parents Aid is organized as a Massachusetts non-profit corporation. It provides, through its medical director and supporting personnel, abortions for varying fees, depending upon ability to pay." 393 F. Supp. at 851.

10. "[G]eneral enforcement of the statute against physicians alone would seriously interfere with its [Parents Aid Society's] ongoing activities." 393 F. Supp. at 851.

11. "Plaintiff Gerald Zupnick, a resident of New York, is a physician licensed in Massachusetts, and is Parents Aid's medical director. he works regularly at the latter's place of business two days a week, performing

abortions on a fee basis. ... [We] credit his testimony that the threat of prosecution would force him to cease." 393 F. Supp. at 851-852.

12. "We find nothing about abortions that requires the minor's interest to be treated differently from other medical and surgical procedures, as to which we find the custom to be to proceed on the consent of one parent." 393 F. Supp. at 852.

13. "Under all the circumstances we find that plaintiffs had every reason to believe that they had only two alternatives, to continue their current activities and face immediate arrest, or to bring the present suit." 393 F. Supp. at 852.

14. "Defendants' doctor's considerably higher figure we attribute to the fact that he does not do abortions as such, but only 'terminates pregnancy' when there is already some medical necessity. Even he did not suggest any greater risks for minors than for adults." 393 F. Supp. at 853.

15. "Probably most parents are supportive. We are obliged to find, however, that an appreciable numer are not, for a variety of reasons." 393 F. Supp. at 853.

16. "We must find, however, that a significant number of minors who are capable of consenting are unwilling to tell their parents, either because they correctly fear what would happen to

themselves, or, although they would expect support from their parents would under no circumstances consent to the abortion they wish, or, because of their views on illegitimacy and the stigma attaching to unmarried mothers, would attempt to make them enter into a marriage they do not want." 393 F. Supp. at 853.

17. "There are also minors who, understandably, do not wish to have their parents know of their condition because of the distress that it would cause them, and the minor's own consequent feelings." 393 F. Supp. at 853.

18. "Of unquestionable numerical importance, we cannot overlook the fact that many parents believe with total

sincerity that abortion is morally impermissible, either under all circumstances or unless to save the life of the pregnant woman." 393 F. Supp. at 854.

19. "Plaintiffs' experts were of the view that a majority of 16 and 17 year olds are capable. Defendants' experts, although they felt that essentially all are capable at 18, considered the 18th birthday a significant turning point, and would concede only a substantial minority at age 17. Whatever may be the value of conclusive presumptions making the 18th birthday a turning point for such matters as voting, the purchase of liquor, and entering into contracts for

necessaries, ... we can attach no such factual magic to that birthday." 393 F. Supp. at 854-855.

20. "But whichever experts are correct, it is enough for present purposes that we find that a substantial numer of females under the age of 18 are capable of forming a valid consent." 393 F. Supp. at 855.

21. "The statute does not purport to require simply that parents be notified and given an opportunity to communicate with the minor, her chosen physician, or others." 393 F. Supp. at 855.

22. "The statute does not exclude those capable of forming an intelligent consent, but applies to all minors." 393 F. Supp. at 855.

23. "The statute does not purport simply to codify what we find to be accepted medical practice in Massachusetts hitherto, namely, that certain medical procedures involving minors require the consent of a parent. This statute creates a special, unique exception by requiring the consent of both parents." 393 F. Supp. at 855.

In sum, this Court has already found sufficient curcial facts in the prior proceedings to form a substantial basis for this motion. Those central facts, set out in detailed quotations above, may be summarized as follows:

(1) Plaintiff Mary Moe represents a substantial class of unemancipated mature minors who do not want to

consult with their parents conerning pregnancy termination.

(2) There is "nothing about abortions that requires the minor's interest to be treated differently from other medical and surgical procedures ...." 393 F. Supp. at 852.

The statute as construed, and as viewed in contrast with the Massachusetts common law and other statutes, singles out abortion-seeking minors in Mary Moe's class for different treatment. They must obtain parental consent or go through a judicial proceeding required of no one else for no other medical care. The record deals extensively with the medical and psychological aspects of abortion and reveals no rational basis whatsoever for such a distinction.

Plaintiffs accordingly move for summary judgment pursuant to Fed. R. Civ. P. 56 upon the extensive facts

previously found in Baird v. Bellotti, 393 F. Supp. at 847 (D. Mass. 1975), the memorandum of law filed herewith, and the entire file and record.

RESPECTFULLY SUBMITTED:

Roy Lucas
Suite 604
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007

Joan C. Schmidt
One Center Plaza
Boston, MA 02108

ATTORNEYS FOR PLAINTIFFS

April 4, 1977

(Title omitted in printing)

COMPLAINT OF PLAINTIFFS- INTERVENORS

Jurisdiction

1. Plaintiffs-intervenors Planned Parenthood League of Massachusetts, Phillip G. Stubblefield and Crittenton Hastings House & Clinic seek injunctive and declaratory relief prohibiting the enforcement of the parental and judicial consent requirements of Mass. G.L. c. 112, §12P. The parental and judicial consent requirements unconstitutionally restrict the performance of abortions in violation of the standards set forth in Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); and Planned Parenthood of Missouri v. Danforth, U.S. , 96 S. Ct. 2831 (1976). This Court has jurisdiction under the provisions of

28 U.S.C. §§1343(3) and 1331. Relief is authorized by 42 U.S.C. §1983 and 28 U.S.C. §2201.

2. A three-judge district court must hear the prayers for injunctive relief as required by 28 U.S.C. §2281 and 2284, which were in force when this action was brought.

Parties

3. Planned Parenthood League of Massachusetts ("Planned Parenthood") is a not-for-profit unincorporated association with its principal office in Cambridge, Massachusetts. Planned Parenthood has been determined to be exempt from Federal income tax as an organization organized exclusively for charitable purposes within the meaning of §501(c)(3) of the Internal Revenue Code of 1954, as amended.

4. Phillip G. Stubblefield, M.D., is a resident of Brookline, Massachusetts, and a physician licensed to practice medicine in the Commonwealth of Massachusetts.

5. Crittenton Hastings House & Clinic is a Massachusetts corporation, organized and existing as a non-profit corporation pursuant to Mass. G.L. c. 180, and has a principal place of business in Brighton (Boston), Massachusetts. Plaintiff is also a corporation which has been determined to be exempt from Federal income tax as a corporation organized exclusively for charitable purposes within the meaning of §501(c)(3) of the Internal Revenue Code of 1954, as amended.

6. Defendant Bellotti is the Attorney General of the Commonwealth of Massachusetts. Defendant Byrne is District Attorney of the County of Suffolk. Defendant-intervenor Hunerwadel is a resident and citizen of said Commonwealth.

Statutory Provisions Challenged

7. Mass. G.L. c. 112, §12P: "Consent to abortion; hearing; form; filing; civil remedies preserved

(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. . . ."

8. As construed by the Massachusetts Supreme Judicial Court in Baird v. Attorney General, Mass. Adv. Sh. (1977) 96, c. 112, §12P:

a) requires prior notice to both parents in every instance where a pregnant minor seeks court approval for an abortion;

b) prohibits a mature minor from consenting to an abortion notwithstanding the fact that in Baird v. Attorney General supra, the court enunciated a "mature minor rule" which

permits a mature minor, without judicial involvement, to consent generally to medical treatment; and

c) Excludes only abortions (and sterilization) from the provisions for consent by a minor to medical treatment set forth in Mass. G.L. c. 112, §12F.

Facts

9. Planned Parenthood is a social service agency organized to encourage and facilitate responsible fertility-related behavior and to assure the availability within the state of the full panoply of birth control alternatives, regardless of the age or economic status of the individual seeking such services. In furtherance of its purposes, Planned Parenthood provides a counseling information and referral service. During 1976, Planned Parenthood counseled between twelve and thirteen thousand persons, of whom some thirty

percent called specifically for abortion counselling. Of these, eighteen percent were minors. If enforced, the parental and judicial consent provisions of Mass. G.L. c. 112, §P would seriously interfere with the ability of Planned Parenthood to fulfill its stated purposes in at least the following ways:

a) it would impair the furtherance of responsible fertility-related behavior, in that it would encourage minors who are unwilling or unable to inform their parents of their pregnancy to ignore their condition until the choice to have an abortion was forclosed;

b) it would impair the agency's counseling service in that it will become impossible to refer to Massachusetts clinics those minor clients who are unable or unwilling to inform their parents of their pregnancy;

c) it would further impair the agency's counseling of minor clients who are poor, who cannot afford to go out of state for medical care, or who would be unable to receive Medicaid payments for medical care received outside Massachusetts.

10. Dr. Stubblefield is an Assistant Professor of Obstetrics and Gynecological Medicine at the Harvard Medical School and Director of the Clinical Population Unit at the Boston Hospital for Woman. As part of his regular professional duties, he currently performs abortions on consenting minor women. The statutes at issue apply directly to his activities as physician and clinic director and would, if enforced, cause him to discontinue performing abortions on minor women without the consent of both their parents or order of the Massachusetts Superior Court.

11. Crittenton Hastings House & Clinic has assisted women with unplanned and/or unwanted pregnancies for over 140 years. Since 1973, it has operated a medical facility and clinic, and provided clinical health and medical services, including birth control, abortion and abortion-related services. Said plaintiff also operates a residential program and an out-patient pre-natal care program for women who wish to carry their pregnancies to term. Said plaintiff is fully licensed under Massachusetts law to provide the foregoing services. During 1976, said plaintiff provided abortion services to 2776 women, approximately 15-20% of whom were minors. Numerous hospitals and social agencies refer patients, including many low-income minors, to said plaintiff's clinic. Said plaintiff does not require parental or judicial consent for abortion.

Enforcement of §12P would expose said plaintiff to criminal liability or force it to curtail on-going activities.

12. Plaintiffs-intervenors each have a professional relationship with pregnant minors who seek their services for abortions and for abortion counseling, and consequently have standing to raise constitutional issues on their behalf, as well as on behalf of plaintiff-intervenors' own, direct interests.

13. On March 24, 1977, the Attorney General of the Commonwealth filed with this Court a "Motion to Dissolve the Preliminary Injunction" -- i.e., this Court's stay of enforcement of c. 112, §12P, and for sanctions under Fed. R. Civ. P. 37.

14. If the enforcement of §12P is not stayed, plaintiffs-intervenors will be irreparably harmed.

Violation of Constitutional Rights

15. The parental and judicial consent provisions of c. 112, §12P violate rights guaranteed to plaintiffs-intervenors by the Fourteenth Amendment ot the Constitution of the United States and under Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Danforth, supra, in that they impermissibly impair the rights of plaintiff-intervenors to provide abortions and abortion related services.

16. The parental and judicial consent provisions of c. 112, §12P violate rights guaranteed to unmarried pregnant minors by the Due Process clause of the Fourteenth Amendment to the Constitution of the United States and by Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Danforth, supra, in that these provisions impermissibly burden the rights of such minors to obtain abortions and abortion related services.

17. The parental and judicial consent provisions of c. 112, §12P, in light of c. 112, §12F, violate rights guaranteed to plaintiffs-intervenors and to unmarried pregnant minors by the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States in that these statutes prefer and discriminate in favor of:

a) unmarried pregnant minors who choose to carry a pregnancy to term as against such minors who choose to terminate their pregnancies with an abortion;

b) married, widowed or divorced pregnant minors as against unmarried pregnant minors;

c) mature minors who wish to be provided any form of medical treatment or operation, however serious, other than abortion, as against such minors who wish to be provided an abortion.

Relief

WHEREFORE, plaintiffs-intervenors pray that this Court:

1) Continue in effect the existing stay of enforcement of Mass. G.L. c. 112, §12P;

2) Issue a permanent injunction enjoining the enforcement of Mass. G.L. c. 112, §12P;

3) Declare that Mass. G.L. c. 112, §12P is a violation of the Due Process and the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States;

4) Award reasonable attorney's fees and costs;

5) Grant such other relief as is just and proper.

By their attorneys,

John H. Henn
Carolyn S. Grace
Foley, Hoag & Eliot
10 Post Office Square
Boston, MA 02109
617-482-1390

Roger P. Stokey
294 Washington Street
Boston, MA
617-423-2666

DATED: April 1, 1977

[Title omitted in printing]

DEFENDANTS' INITIAL STATEMENT OF DISPUTED MATERIAL FACTS

INTRODUCTION

Defendants submit this initial statement of disputed material facts to comply with the Court's order of April 5, 1977 requesting a preliminary response to plaintiffs' motion for summary judgment. This statement is an initial one because defendants have found it difficult to respond to both plaintiffs' motion and the motion to intervene of Planned Parenthood, et al., within a week's time.[1]

[1] Plaintiffs filed their motion for summary judgment on April 5th, 1977 and without previously informing defendants of their intentions. Defendants had been proceeding on the assumption that plaintiffs would seek a trial.

Moreover, the procedural posture of this case is unusual and complex. Although the Court held a full evidentiary hearing two years ago, the evidence adduced and rulings made were premised upon a now-displaced interpretation of the challenged statute. Moreover the Supreme Court and the Supreme Judicial Court have refined some of the other legal issues involved in the case, but these references have had no effect upon the record. Finally, defendants remain uncertain of the Court's view of the materiality of some of its previous findings, several of which plaintiffs rely upon in their motion for summary judgment.

Given the constraints of time and the uncertain formulation of the factual and legal issues, defendants thought it best to file this initial statement. Set forth below is an

enumeration of the material facts defendants consider in dispute, organized by legal issue and annotated with reference to the case law in those instances in which materiality seems equivocal. At this point, defendants take the position that, since genuine issues of material fact exist, summary judgment is not available. Defendants remain prepared to reconsider their position, however, on the basis of the Court's disposition of this initial statement.

LIST OF MATERIAL FACTS IN DISPUTE[2]

I. The Undue Burden Issue

A. How many girls under the age of 18 seek abortions in Massachusetts each year? How many of these girls are nine-twelve years old? How many of these girls are thirteen-fifteen years old? How many of these girls are sixteen-eighteen years old? (See Exhibit A.)

B. Of the girls who seek abortions, how many do so with

1. one parent's consent;

2. both parents' consent;

---

2 The list is drawn in question form since defendants at this point in discovery have more questions than answers. Defendants assume that the parties will disagree over most of the answers to these questions.

3. no parental consent?[3]

C. For each category of B, what is the distribution of

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3 "We have never held or implied on common law grounds that a physiciain may operate on a minor, where there is no emergency, without the consent of at least one parent. We have indicated that such an unauthorized operation constitutes an intentional tort. See Reddington v. Clayman, 334 Mass. 244, 246-247 (1956). The Legislature's treatment of the subject of consent to medical treatment of a minor has been consistent with the general common law principle that parental consent is necessary for medical services to be performed in the absence of an emergency . . . [footnote omitted]." Baird v. Attorney General, 1977 Mass. Adv. 96, 110, 360 N.E.2d 288, 297 (1977) [hereinafter Attorney General].

duration of pregnancies, i.e., for those girls who seek an abortion with the consent of one parent, how many do so within the first four weeks of the first trimester, the first six, etc?[4]

D. For those girls in category B3, how many do not seek parental consent
   1. because they correctly fear parental sanctions;
   2. because they believe their parents would not consent;
   3. because they believe their parents would attempt to make them

---

[4] See plaintiffs' Memorandum in Support of Their Motion for Summary Judgment [hereinafter plaintiffs' memorandum] at 15, lines 25-27.

enter into a marriage they do not want;
   4. because they desire not to upset their parents?

E. For each category in D other than the first, how many parents respond or would respond in the manner their daughters anticipate? How many would respond otherwise, and how would they respond?

F. Of those girls who seek abortions after consulting one or both parents, how much delay, if any, is attributable to their securing parental consent? Of those girls who seek abortions without parental consent, how long would it take for them to consult with their parents?

G. In those cases in which a girl sought an abortion without parental consent, was required to consult her parents, and was refused parental authorization, how quickly could she present her case to the Superior Court and obtain a decision?[5]

H. How quickly could a girl in the circumstances described in G obtain appellate review of an adverse Superior Court ruling?[6]

I. Would a girl who sought Superior Court authorization for an abortion after her parents refused to consent suffer substantial injury to her health and welfare as a

---

5 Compare plaintiffs' memorandum at 16, lines 1-5 with Attorney General at 113-15, 360 N.E.2d at 297-98.

6 Compare plaintiffs' memorandum at 16, lines 1-5 with Attorney General at 115-16, 360 N.E.2d at 298.

result? How does this injury, if any, compare to the injury, if any, children suffer through their participation in custody, guardianship, commitment, juvenile deliquency, or intra-familial tort proceedings?[7]

J. Of the girls identified in A and B, how many would

1. seek out-of-state abortions or
2. seek in-state abortions from unlicensed persons or facilities

---

7 Bellotti v. Baird, 428 U.S. 132, 149-50 (1976); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 75; 91 (Stewart, J., concurring); 95 (White, J., concurring and dissenting); 103-04 (Stevens, J., concurring and dissenting) (1976) [hereinafter Danforth].

if the statute were in effect and applied as interpreted by the Supreme Judicial Court?[8]

K. What other medical, surgical, or psychiatric procedures or treatments, other than abortion, sterilization, and methadone maintenance[9] are governed by statute, regulation, or professional practice so as to require the consent of both parents

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[8] Danforth at 104 (Stevens, J., concurring and dissenting and stating that "[t]he State's interest is not dependent on an estimate of the impact the parental-consent requirement may have on the total number of abortions that may take place . . .").

[9] Mass. Gen. Laws Ann. ch. 112, §§ 12E (exclusion of methadone maintenance), 12F (exclusion of abortion and sterilization) (West Supp. 1976).

before being performed on or administered to minors?[10]

L. What is the practice of licensed Massachusetts health care personnel and institutions concerning "mature minors" who seek health care other than abortion or sterilization and including methadone maintenance without parental consent? What is the practice of these persons and institutions concerning "non-mature minors" who seek the same care in the same circumstances?[11]

---

[10] See note 7, supra.

[11] Bellotti v. Baird, supra at 144-45; Attorney General at 108-12, 360 N.E.2d at 293-97.

M. Does the statute "needlessly and incorrectly" increase the likelihood of minors having to seek judicial authorization for abortion surgery? If so, how?[12]

N. What risks, if any, would a female Massachusetts citizen under 18 expose herself to by seeking a legal abortion in another jurisdiction? What is the probability of such a girl's experiencing such untoward occurrences?[13]

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12 Baird v. Bellotti, Civil Action No. 74-4992-F (D. Mass., Feb. 10, 1977) at 3.

13 Plaintiffs' memorandum at 16, lines 32-4.

II. The "Degree and Justification" Issue

A. What is the practice of licensed Massachusetts health care personnel and institutions concerning the performance or administration of the folowing range of procedures or treatments upon a) "mature minors" and b) "non-mature minors" with the consent of one parent, the consent of both parents, and no parental consent:

1. sterilization;
2. prescription of birth control drugs or devices;
3. methadone maintenance;
4. venereal disease;
5. amputations (therapeutic and corrective);
6. shock therapy;
7. kidney and bone marrow transplants;

8. psychiatric commitments;
9. venipuncture;
10. blood donations,
11. experimental therapy;
12. medical research?[14]

B. How many of each of the procedures or treatments listed in A are performed annually in Massachusetts upon a) "mature minors" and b) "non-mature minors" with
   1. the consent of one parent;
   2. the consent of both parents;
   3. no parental consent?

C. What are the medical, social, and related justifications for the differences, if any, in the practices of Massachusetts health care professionals and institutions[15] concerning the procedures and treatments enumerated in A?

D. What are the circumstances in which it is the practice of licensed Massachusetts health care professionals and institutions to seek court approval prior to administering medical care to minors?[16]

14 Bellotti v. Baird, supra at 149-50; Baird v. Bellotti, supra at 4-5; see Attorney General at 116-18, 123-26, 360 N.E.2d at 298-99, 302-03.

CONCLUSION

Defendants submit that this initial list of disputed facts is sufficiently substantial to require denial of plaintiffs' motion for summary judgment. Unless the Court determines that they are not material, defendants believe that further discovery and trial are necessary to

15 See note 13, supra.

16 See notes 12 and 13, supra.

resolve the disputes and establish an adequate record.

By their attorneys,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

_____
Garrick F. Cole
Assistant Attorney General
727-1004

_____
Thomas Kiley
Assistant Attorney General
One Ashburton Place
Boston, MA 02108

Dated: April 12, 1977

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN
Southern Division
CASE NO. G75-142 CA 2

JOHN DOE, JANE DOE, THOMAS M. GROST, and CORA W. GROST, individually and on behalf of all other similarly situated,
Plaintiffs,
vs.

MARIANNE DAVIS, Administrator, and JOHN HAZEN, M.D., Medical Director Ingham County Family Planning Center, a/k/a Tri-County Family Planning Center; ELINOR HOLBROOK, GILDA RICHARDSON, MARIE VANDE BUNTE and RONALD PETERS, Members of the Ingham County Board of Health; GEORGE DELLAPORTAS, M.D., Director, Ingham County Health Department, and their successors in office,
Defendants.

The deposition of JAMES H. FORD, M.D., a witness produced and sworn on behalf of the Plaintiffs in the above-entitled cause, taken before GAIL S. KUNIHIRO, CSR, Notary Public, at 11777 San Vicente Boulevard, in the City of Los Angeles, California, on the 30th day of January, 1976, at 1:40 o'clock p.m., pursuant to Subpoena and Subpoena duces tecum.
Reported by Gail S. Kunihiro, CSR #2797

* * * * * *

fact that the doctor is prescribing it, and that there are rap sessions where you counsel it, whether or not they use the contraceptive, they are going to go out and have their premarital intercourse anyway.

Any so you are then going to have [more promiscuity] of course -- [But] Pohlman said, even if that is so, even

if we have increased the promiscuity, that he would feel it was justified as long as we reduce the out of wedlock pregnancies by dispensing more contraceptives devices.

But that has been shown to be wrong, too, because we know that we now have [more out of wedlock pregnancies] -- Although the out of wedlock pregnancies for adult women have leveled off, if not gone down a litte bit, the teenagers have gone up and from '60 to '73, the teenage out of wedlock pregnancy has risen 80 percent; and , as I say, that figure came out [recently] an that's [only] up to '73.

We don't have [the current] figures, but we now have the complaint from many contraceptive clinics saying what are we going to do now with the nine-year-olds coming in, because they don't even understand the brochure; and [now] feel they must tell the

parents about this, so it is a little bit interesting where they are deciding to draw the line.

Apparently, they think 15-year-olds understand enough but a nine-year-old doesn't and admittedly there is some difference, but I think the evidence is clear that we have an epidemic of V.D. We have an epidemic of promiscuity.

Exhibit B

Preteen Clients Worry
Birth Control Conunselors

SAN FRANCISCO (AP)-Girls as young as 9 years old are asking for birth control advice and pose a special problem as to whether their parents should be notified, a Planned Parenthood leader here says.

"A whole new policy or special program must be created for girls 9 to 12 years old who are sexually active and need advice." Dr. Gerry Oliva, medical director for the agency saidin an interview.

Oliva said part of the problem is that the agency's information pamphlets, aimed at reaching adults, are "too complicated for a sixth-grader to understand."

She said the agency has a policy of not telling parents when their children come in for advice or contraceptives. This practice has so far been extended to even the youngest clients.

"It is hard not to call parents when the girls are 9 or 10," Oliva said.

She said the trend toward earlier sexual actively means that parents must advise their children earlier than in the old days.

"Now telling a girl the facts of life when she's 9 years old may be too late to stop her from having sex," Oliva said.

She said she learned at a national Planned Parenthood Federation convention in Seattle earlier this wee that other areas of the country are experiencing the same increase in preteen activity.

"Agency counselors throughout the country are totally overwhelmed by these kids," she said.

Oliva said girls as young as 9 never are given birth control pills, because medical specialists have advised the agency not to provide them unless a girl has had regular menstrual periods for at least a year.

The California Health Department shows 32 births to 12-year-old-mothers during 1974, up from 18 girls of that age who gave birth in 1966.

9-Year-Old Girls Already Ask About Birth Control

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"It is hard not to call the parents when the girls are 9 or 10," Dr. Oliva said.

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"Now, telling a girl the facts of life when she's 9 years old may be too late to stop her from having sex," Dr. Oliva said.

In Rockville, Md., a spokeswoman for the National Centa for Health Statistics, a bureau of the Health, Education and Welfare Department, said of the 3, 136,965 births in the United States in 1973, there were 12,861 births to girls under 15 years old. Of that total, 11,412 were first births, 276 second births, 15 third births and 8 were fourth births.

[Title omitted in printing]

Excerpt From Transcript of
Hearing on April 13, 1977
Constituting Court's Disposition
of Plaintiffs' Motion for
Summary Judgment

JUDGE ALDRICH: I think I had the bailiff call this a two-judge court. Only two of us are here. Judge Freedman is here in spirit, as I told you last week, and is in Springfield. We will consult with him before we take any action as the result of this morning's hearing.

Let me say before we get down to anything else that the Court greatly appreciates the confidential [considerable?] memorandum submitted by Mr. Cole as to the faculty [fact?] issues the defendants consider of relevancy or possible relevancy. In answer to

his implied question whether the Court considers them not material, I can only generalize and, like the defendants, not finally and bindingly so. First I might wonder whether answers could be found to every one of them, but I assume otherwise for the moment.

Secondly, I presently think some are not material, but, thirdly, I think some probably and perhaps clearly could be. Equally, I could not think that these are all answers [ed?] by our prior opinion or opinions. Hence, I -- I'm speaking for all three of us -- do not wish to proceed with the motion for summary judgment on the present record, and an evidentiary trial in the absence of stipulations would seem inevitable.

Before leaving the subject, I would comment on one question in the defendants' memorandum.

G and H, particularly in light of the Supreme Judicial Court opinion, appear to the Court to raise questions of constitutionality as applied and not to present germane questions to this Court.

In other words, we rule now that we will conclusively assume for the purposes of our decision, utmost speed, diligence, and proper procedure and consideration, including protection of privacy by the Superior Court and an Appellate Court. This is a non issue. How shall we proceed?

* * * * * * * *

Annotations in brackets are supplied by counsel.

[Title omitted in printing]

DEFENDANTS' FIRST SET OF REQUESTS
FOR ADMISSIONS TO PLAINTIFF
GERALD ZUPNICK

To: Gerald Zupnick, M.D.
c/o Parents Aid Society, Inc.
673 Boylston Street
Boston, Massachusetts

Pursuant to Fed.R.Civ.P. 36, defendants Francis X. Bellotti, et al., request that you respond to the following requests for admissions. Your answers must be written and made under oath. You must serve your answers upon all parties and file them with the Court within thirty days after their service upon you, or within such other time as the Court determines.

Defendants request that you admit the truth of the following statements, and, as appropriate, the truth of any

subsidiary assertions about the statements:

I. GENERAL BACKGROUND STATEMENTS

A. Distribution of Abortions and Pregnancies by Age of Adolescent

1. The following table sets forth reasonably accurate approximations of the numbers of female adolescents residing in Massachusetts, by age, as of June, 1976:

Age	Number of Female Adolescents
10	53,500
11	56,000
12	57,000
13	55,500
14	58,000
15	58,000
16	58,000
17	58,000

Source: Commonwealth of Massachusetts, Department of Education, Enrollment Statistics for School Year 1975-1976; Statistical Abstracts of the United States, 1976, p.11,27; U.S. Bureau of the Census, Census of Population: 1970 DETAILED CHARACTERISTICS, Final Report PC(1)-D(23) Massachusetts, Table 138.

2. During the calendar year 1976, hospitals and clinics in Massachusetts performed appproximately 33,000 abortions. Of this number, approximately 30,000 or 91% were performed during the first trimester.

Source: Commonwealth of Massachusetts, Department of

Public Health, Abortion Reporting System, Statistics of Induced Abortions.

3. The following statistics are reasonably accurate appoximations of the incidences of pregnancies and abortions among female adolescents in the United States:
   a. Approximately 1,000,000 persons or 10% of the female adolescent population age 15-19 in the United States become pregnant each year;
   b. Approximately 590,000 persons or 5.9% of the female adolescent population age 15-19 in the United States give birth each year;
   c. Approximately 270,000 persons or 2.7% of the female adolescent population age 15-19 in the United States undergo an induced abortion each year;

d. Approximately 140,000 persons or 1.4% of the female adolescent population age 15-19 in the United States experience miscarriages each year;

e. Approximately 30,000 persons or 0.7% of the female adolescent population in the United States under age 15 (the great majority of which is composed of persons 13 or 14) become pregnant each year;

f. Approximately 13,500 persons or 0.315% of the female adolescent population in the United States under age 15 (the great majority of which is composed of persons 13 or 14) undergo an induced abortion each year;

g. Approximately 12,600 persons or 0.294% of the female adolescent population in the United States under age 15 (the great majority of which is composed of persons 13 or 14) give birth each year;

h. Approximately 3,900 persons or 0.091% of the female adolescent population in the United States under age 15 (the great majority of which is composed or persons 13 or 14) experience miscarriages each year.

Source: "11 Million Teenagers", Planned Parenthood Federation of America, Allan Guttmacher Institute (1976); Jaffe & Dryfoos, "Fertility Control and Services for Adolescents: Access and Utilization ," 8 Family Planning Perspectives 4: 167, 174 (1976).

4. There is no reason to believe that the distribution of adolescent pregnancies and their outcomes stated in paragraph (3), above, is not similar to the distribution of adolescent pregnancies and their

outcomes among the Commonwealth's female adolescent population.

5. Assuming that the distribution of adolescent pregnancies and their outcomes stated in paragraph (3) is similar to the distribution of adolescent pregnancies and their outcome among the Commonwealth's female adolescent population, the following table sets forth reasonably accurate approximations of the number of pregnancies and their outcomes which female adolescents in Massachusetts experience each year by age category:

Age	Pregnancies	Abortions
Births	Miscarriages	
13	N/A	N/A
N/A	N/A	
13-14	660	300
275	85	
15-19	22,000	5,940
12,980	3,080	

Source: Paragraphs 1, 2, and 3 above.

6. Plaintiff Gerald Zupnick has no knowledge concerning the distribution of abortions performed on female adolescents in Massachusetts with respect to whether these abortions were performed with no parental consent, with one parent's consent, or with two parents' consent.

7. Plaintiff Gerald Zupnick has no knowledge concerning the distribution of abortions performed on female adolescents in Massachusetts with respect to whether those abortions were performed on married or unmarried female adolescents.

8. (a) During calendar year 1975, hospitals and clinics in New York State performed 153,484 abortions. Of this number,

1,670 or 1.08% were performed on female adolescents under 15 years of age, and 38,345 or 24.98% were performed on female adolescents between 15 and 19 years of ago.

(b) 704 female Massachusetts residents obtained abortions in New York State in 1975. This number amounted to 0.46% of the total abortions performed in New York State in 1975.

(c) In New York State, during the years 1971-1975, the distribution of abortions by age of females obtaining abortions remained fairly constant, i.e., approximately 1% were performed on female adolescents under 15 each year and approximately 25%

were performed on female adolescents 15-19 years of age.

Source: New York State Department of Health, Report of Selected Characteristics of Induced Terminations of Pregnancy Recorded in New York State January-December 1975 With Five Year Summary 1971-1975 (undated).

B. Facts Concerning "Legally Effective Consent" to Abortion Procedures

9. The percentage of female adolescents who are unable to give

legally effective consent[5]

For the purpose of answering the series of requests in this sub-section, please assume that the term "legally effective consent" has the meaning which the District of Columbia Court of Appeals suggested in Canterbury v. Spence, 464 F.2d 772, 782, 786-87 (D.C. Cir. 1972): a person capable of granting "legally effective consent" to medical care is one who is competent to evaluate the information which a physician must provide to meet his duty to make "reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved . . . [and] the test for determining whether a particular peril must be divulged is its materiality to the patient's decision: all risks potentially affecting the decision must be unmasked . . . ."

to medical or surgical procedures varies continuously and increases as their age decreases.

10. A majority of females 17 years old is unable to give legally effective consent to medical or surgical procedures.
11. A majority of females 16 years old is unable to give legally effective consent to medical or surgical procedures.
12. A majority of females 15 years old is unable to give legally effective consent to medical or surgical procedures.
13. A majority of females 14 years old is unable to give legally effective consent to medical or surgical procedures.
14. A majority of females 13 years old is unable to give legally effective consent to medical or surgical procedures.

15. A majority of females 12 years old is unable to give legally effective consent to medical or surgical procedures.
16. A majority of females 11 years old is unable to give legally effective consent to medical or surgical procedures.
17. A majority of females 10 years old is unable to give legally effective consent to medical or surgical procedures.
18. A majority of females 9 years old is unable give legally effective consent to medical or surgical procedures.
19. A majority of females 8 years old is unable to give legally effective consent medical or surgical procedures.
20. A majority of females 7 years old is unable to give legally effective consent to medical or surgical procedures.

21. A majority of females 6 years old is unable to give legally effective consent to medical or surgical procedures.
22. A majority of females 5 years old is unable to give legally effective consent to medical or surgical procedures.
23. No female 17 years old is able to give legally effective consent to medical or surgical procedures.
24. No female 16 years old is able to give legally effective consent to medical or surgical procedures.
25. No female 15 years old is able to give legally effective consent to medical or surgical procedures.
26. No female 14 years old is able to give legally effective consent to medical or surgical procedures.
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28. No female 12 years old is able to give legally effective consent to medical or surgical procedures.
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31. No female 9 years old is able to give legally effective consent to medical or surgical procedures.
32. No female 8 years old is able to give legally effective consent to medical or surgical procedures.
33. No female 7 years old is able to give legally effective consent to medical or surgical procedures.
34. No female 6 years old is able to give legally effective consent to medical or surgical procedures.
35. No female 5 years old is able to give legally effective consent to medical or surgical procedures.

C. Post-Operative Complications Of Abortion Procedures.

36. With respect to the following quotation defendants request that you admit that:
a. the quoted material actually appears in the cited journal as it is reproduced here;
b. the journal in which the quoted material appears is a reliable medical or scientific authority; and
c. the quoted material's factual statements are correct:

The postoperative complications [of abortions] can be divided roughly [sic] into two groups: those which occur immediately and are associated with the particular procedure utilized for the termination of pregnancy, and the delayed complications which may

occur as much as 2 to 3 weeks or more after the procedure is performed. Each of the procedures utilized has complications which are peculiar to that particular procedure.

VACUUM ASPIRATION

Primary complications are damage to the lower uterine segment and uterine fundus by tearing or perforation. In most cases, the initial trauma occurs during cervical dilatation and may involve either splitting of a rigid lower uterine segment or actual perforation of the softened myometrium by a cervical dilator. These surgical accidents may result in extensive retroperitoneal and intraperitoneal hemorrhage and, if the surgeon proceeds with the

vaccum aspiration, trauma to various intraperitoneal structures may occur.

The other complication of this procedure results from the incomplete removal of the products of conception. Such incomplete removal almost always results in profuse vaginal bleeding, which may not become significant until 2 to 5 days after the procedure is performed and may be associated with evidence of endometritis or parametritis. If such incomplete removal of products of conception is also combined with uterine trauma, with perhaps retroperitoneal hematoma, the combined effect may result in serious vaginal hemorrhage and wide-spread pelvic infection, occasionally requiring surgical drainage of a pelvic abscess or hysterectomy. Such complications

would be particularly devastating in an adolescent woman. Minor episodes of increased vaginal bleeding are quite common and usually require little treatment other than a brief course of methyl ergonovine and reassurance.

Simple endometritis, following a properly performed vacuum apiration, usually follows the use of vaginal tampons or having sexual intercourse too soon after the procedure. It is best managed by antibiotic therapy. Curettage is usually not necessary unless the patient fails to respond promptly to conservative therapy.

The overall immediate complication rate in the hands of competent surgeons involved in the termination of pregnancy up to 12 weeks of gestation need not be greater than 1.5 to 2 per cent

since higher complication rates are almost always associated with inexperience and poor judgment.[5]

HYPERTONIC SALINE INSTILLATIONS

The complications associated with this procedure are more frequent and, because of the longer duration of gestation, more serious.[1] If the technique of

Note: Footnote references are

1. Kerenyi, T.: Personal communication.

5. Tietze, C., and Lewit, S.: Early medical complications of legal abortion - The JPSA study. To be published by Case Western Reserve Law Review, Abortion and the Law.

amniocentesis or saline instillation is faulty, the hypertonic saline may be injected directly into the maternal vascular system. Such an occurrence brings about an immediate reaction - peripheral vasodilatation and tachyeardia. The patient will almost immediately complain of an intense headache. Of course, the instillation should cease and the patient should receive a rapid intravenous infusition of 5 percent dextrose in water. Intraperitoneal extravasation of hypertonic saline causes severe abdominal pain and may be treated by peritoneal lavage with sterile 5 per cent dextrose in water. Approximately 15 per cent of all cases of pregnancies terminated by this technique will have a retained placenta which is

frequently the cause of extensive vaginal bleeding. It is for this reason, among many others, that this procedure should be performed in a hospital where all patients will require curettage or manual removal of the placenta. The occasional woman who has a previously undiagnosed placenta previa will also experience significant vaginal bleeding prior to the expulsion of the product of conception. The need for blood transfusions with the ensuing risks is significant in these cases. A large series reports a transfusion incidence of 2.3 per cent.[1]

Note: Footnote reference is

1. Kerenyi, T.: Personal communication.

Recently, there have been several reports of a consumption coagulopathy occurring at the time of instillation of hypertonic saline, which results in profuse hemorrhage because of hypofibrinogenemia. While this complication is rare, the hemorrhage may be extensive and quite frightening. Treatment includes fibrinogen, whole blood, and heparin.

Fever as a result of endometritis or parametritis occurs in about 2.3 per cent of all cases and may be associated with retained placental fragments. Treatment with antibiotics and uterine curettage are usually necessary. Occasionally, more widespread pelvic infection may occur, but these cases also respond promptly to simple therapeutic measures.

HYSTEROTOMY

The complications of hysterotomy are essentially the same as those associated with caesarian section and need not be reviewed at this time.

Source: Hausknecht, "The Termination of Pregnancy in Adolescent Women", 19 Pediatric Clinics of North America 3: 803, 807-808 (1972).

36A A paper describing the results of the Joint Program for the Study of Abortion which involved a total of 72,988 abortion procedures contained a lengthy discussion of the complications and mortality resulting from abortion procedures. That discussion is quoted below.

With respect to the following quotation, defendants request that you admit that:

a. the quoted material actually appears in the cited journal as it is reproduced here;

b. the journal in which the quoted material appears is a reliable medical or scientific authority;

c. the quoted material's factual statements are correct;

d. the quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

COMPLICATIONS

The number of postabortion complications reported in JPSA [Joint Program for the Study of Abortion] was very large because it included many complaints of a comparatively trivial nature, such as a single day of fever or vomiting after anesthesia, which are not usually listed in official reports. The total number of women with one or more complaints was 7039 or 9.6% of all JPSA patients. Not classified as complications were 893 cases, or 1.2% of all JPSA abortions, reported as failures of the primary procedure of which 569 cases were followed by a successful repetition of the same procedure and 324 cases, by changing to other procedures.

A broad definition of complications has the advantages of including complaints reported by patients, as well as diagnoses made by physicians, and of permitting the analysis of the incidence for comparatively small numbers of women. On the other hand, it may produce a quite distorted impression of the risk to health associated with a legal abortion. We have therefore attempted to identify a more restricted group of "major complications," including all patients experiencing unintended major surgery (laparotomy and repair, hysterotomy, and hysterectomy - 120 cases); all patients requiring one or more blood transfusions (277); all patients with 3 or more days of fever (358); and several other categories associated with roughly

comparable degrees of risk of death, prolonged illness, or permanent functional impairment. The total number of cases assigned to major complications was 765, 1% of all patients and 11% of all patients with complications. Of th 765 patients with major complications, 43 remained in the hospital for 2 weeks or longer postoperatively or after readmission.

Although every definition of major complication is arbitrary to some degree, at least until standards are agreed upon by the medical profession, it was encouraging to find that the patterns of major and total complications were similar in their association with such variables as period of gestation and primary procedure.

MORTALITY

Seven deaths were recorded among the 72,988 JPSA patients, corresponding to a mortality rate of 9.6 per 100,000 abortions. All but one involved abortions in the second trimester. Three deaths occurred among 1755 patients aborted by major surgery; three deaths among 14,690 abortions by the saline method; and one death among 56,273 patients aborted by suction or D and C.

In four of the seven cases the fatal outcome could be directly attributed to the abortion. The first patient was 45 years of age when she underwent hysterotomy and bilateral tubal ligation. Within 3 hours after the operation, she developed disseminated introvascular coagulation with severe hypofibrinogenemia. The

patient did not respond to treatment and died on the eighth postoperative day.

The second patient was a woman 37 years of age whose pregnancy was terminated by saline at 15 weeks' gestation. Soon after the instillation, she developed hypernatremia with cerebral endema, leading successively to convulsive episodes, prolonged hypoxia, and renal failure, as well as to aspiration pneumonia. She died 10 days after the instillation.

The third fatality was a woman from another state who sought treatment under an assumed name in a participating hospital in New York City. Having undergone instillation of saline as an outpatient, she returned to her home where she died on the following day of severe hemorrhage

while passing a fetus compatiable in size with a gestation of about 24 weeks.

The fourth patient was a primigravida, 18 years old, who committed suicide 3 days after the suction procedure, because of guilt feelings about having "killed her baby," before she could be informed that she had not been pregnant.

In the three other cases, preexisting disease doubtless contributed to the fatal outcome. One patient had a history of rheumatic heart disease, mitral stenosis and insufficiency, bacterial endocarditis, and addiction to heroin. She collapsed on the operating table immediately following hysterotomy; the cause of death was recorded as cardiac arrest. Another patient had a long history of pelvic

inflammatory disease with repeated abdominal operations. Following hysterotomy she developed peritonitis and died 6 days postoperatively. The seventh deceased patient, who had a history of schizophrenia, was aborted by saline late in the second trimester. She was returned to a psychiatric institution and 1 month later left the hospital against medical advice and committed suicide. The association of this death with abortion is highly questionable.

Source: Tietze and Lewit, "A National Medical Experience: The Joint Program for the Study of Abortion (JPSA)," reproduced in The Abortion Experience Psychological & Medical Impact, 1, 12 (H. Osofsky & J. Osofsky ed. 1973).

36B A paper describing the results of the Joint Program for the Study of Abortion, which involved a total of 72,988 abortions, contained a table comparing complication rates of patients who received abortions only to those who received an abortion plus another surgical procedure. That table is reproduced below. With respect to the following quotation, defendants request that you admit that:

a. the quoted material actually appears in the cited journal as it is reproduced here;

b. the journal in which the quoted material appears is a reliable medical or scientific authority;

c. the quoted material's factual statements are correct;

d. the quoted material's statements of expert judgment and

opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

TABLE 1-6. Number of All Patients and Patients with "Abortion Only," and Complication Rates per 100 Women, by Period of Gestation

Gestation (wk)	Number		Total complication rate		Major complication rate	
	Total patients	Local patients with followup	Total patients	Local patients with followup	Total patients	Local patients with followup
All patients						
6 or less	2,367	857	5.2	8.9	0.9	2.0
7–8	15,137	5,448	4.2	6.3	0.4	0.6
9–10	22,422	8,150	4.8	7.2	0.6	0.9
11–12	13,954	5,434	6.8	10.0	1.0	1.7
13–14	4,044	1,895	15.9	19.3	2.1	2.3
15–16	3,774	1,761	24.0	27.8	2.5	3.1
17–20	9,573	3,816	24.0	28.9	2.2	3.3
21–24	1,616	552	22.8	24.1	2.1	3.1
25 or more	101	36	26.7	30.6	*	*
12 or less	53,880	19,889	5.2	7.8	0.6	1.1
13 or more	19,108	8,060	22.2	26.1	2.2	3.0
All gestations	72,988	27,949	9.6	13.1	1.0	1.6
"Abortion only"						
6 or less	2,246	782	4.1	7.0	0.6	1.3
7–8	14,344	5,008	3.5	5.1	0.3	0.4
9–10	21,194	7,515	4.1	6.1	0.4	0.6
11–12	12,838	4,799	5.2	7.2	0.5	0.7
13–14	3,495	1,576	13.4	16.2	1.2	1.3
15–16	3,293	1,488	22.3	25.9	1.8	1.9
17–20	8,748	3,352	22.7	27.1	1.7	2.6
21–24	1,456	472	20.9	21.2	1.2	(1.3)
25 or more	83	29	25.3	(27.6)	*	*
12 or less	50,622	18,104	4.2	6.2	0.4	0.6
13 or more	17,075	6,917	20.6	24.0	1.6	2.1
All gestations	67,697	25,021	8.4	11.1	0.7	1.0

( ) and * = Inadequate number of women at risk.

Source: Tietze and Lewit, "A National Medical Experience: The Joint Program for the Study of Abortion (JPSA)," reproduced in The Abortion Experience, Psychological & Medical Impact, 1, 16 (H. Osofsky & J. Osofsky ed. 1973).

36C A paper describing the results of the Joint Program for the Study of Abortion which involved a total of 72,988 abortions, contained a

graph plotting the range of complication rates per 100 patients with abortion only, by age of the woman. That graph is reproduced below.

With respect to the following quotation, defendants request that you admit that:

a. the quoted material actually appears in the cited journal as it is reproduced here;

b. the journal in which the quoted material appears is a reliable medical or scientific authority;

c. the quoted material's factual statements are correct;

d. the quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and

represent generally accepted professional judgments and opinions:

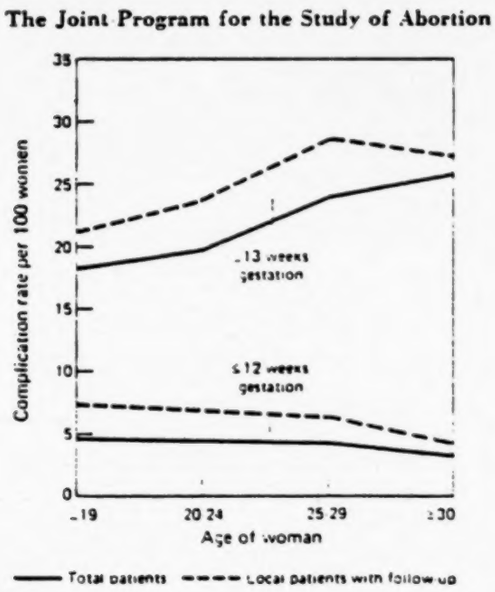


Figure 1-1. Range of complication rates per 100 patients with "abortion only," by age of woman.

Source: Tietze and Lewit, "A National Medical Experience: The Joint Program for the Study of Abortion (JPSA)," reproduced in The Abortion Experience, Psychological & Medical Impact, 1, 19 (H. Osofsky & J. Osofsky ed. 1973)

36D A paper describing the experience of health care institutions in New York City with abortions performed under New York's liberalized abortion law included two tables concerning the complication rates associated with abortion procedures. These two tables are reproduced below.

With respect to the following quotation, defendants request that you admit that:

a. the quoted material actually appears in the cited journal as it is reproduced here;

b. the journal in which the quoted material appears is a reliable medical or scientific authority;

c. the quoted material's factual statements are correct;

d. the quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

TABLE 3-11. Complications Following Abortion, by Type and Period of Gestation, per 1000 Abortions—New York City

Type of complication	Total		12 Weeks and under		13 Weeks and over	
	Number	Rate	Number	Rate	Number	Rate
July 1, 1970–June 30, 1971*						
Hemorrhage	192	1.5	84	0.8	108	4.7
Infection	248	1.9	102	0.9	146	6.3
Perforated uterus	192	1.5	168	1.5	24	1.0
Anesthesia	12	0.1	7	0.1	5	0.2
Shock	9	0.1	2	†	7	0.3
Retained tissue	289	2.2	56	0.5	233	10.1
Failure	67	0.5	5	†	62	2.7
Lacerated cervix	31	0.2	24	0.2	7	0.3
Other	66	0.5	42	0.4	24	1.0
Unspecified	11	0.1	7	0.1	4	0.2
Total complications	1,117	8.5	497	4.6	620	26.8
Total abortions	131,956		108,817			
July 1, 1971–June 30, 1972						
Hemorrhage	187	0.9	56	0.3	131	4.0
Infection	253	1.3	157	0.9	96	2.9
Perforated uterus	191	1.0	156	0.9	35	1.1
Anesthesia	14	0.1	14	0.1	0	—
Shock	1	†	0	—	1	†
Retained tissue	668	3.3	60	0.4	608	18.7
Failure	41	0.2	9	0.1	32	1.0
Lacerated cervix	38	0.2	36	0.2	2	0.1
Other	45	0.2	20	0.1	25	0.8
Unspecified	3	†	2	†	1	†
Total complications	1,441	7.2	510	3.0	931	28.6
Total abortions	199,569		167,012		32,557	
July 1, 1971–June 30, 1972						
Hemorrhage	379	1.1	140	0.5	239	4.3
Infection	501	1.5	259	0.9	242	4.3
Perforated uterus	383	1.2	324	1.2	59	1.1
Anesthesia	26	0.1	21	0.1	5	0.1
Shock	10	†	2	†	8	0.1
Retained tissue	957	2.9	116	0.4	841	15.1
Failure	108	0.3	14	0.1	94	1.7
Lacerated cervix	69	0.2	60	0.2	9	0.1
Other	111	0.3	62	0.2	49	0.9
Unspecified	14	†	9	†	5	0.1
Total complications	2,558	7.7	1,007	3.7	1,551	27.8
Total abortions	331,525		275,829		55,696	

* Note: Source of information: Weekly Reports
† Less than 0.05.

TABLE 3-12. Complication Rates per 1000 Abortions by Type and Method of Termination, New York City

Type of complication	Method of termination				
	Total	Dilatation and curettage	Suction	Saline	Hysterotomy
July 1, 1970–June 30, 1971*					
Hemorrhage	1.5	1.3	0.8	5.0	4.9
Infection	1.9	1.1	0.8	7.6	13.7
Perforated uterus	1.5	1.8	1.6	0.1	6.9
Anesthesia	0.1	0.1	0.1	0.2	1.0
Shock	0.1	0.1	†	0.3	1.0
Retained tissue	2.2	0.6	0.5	13.4	2.0
Failure	0.5	†	0.1	3.6	—
Lacerated cervix	0.2	0.3	0.2	0.1	1.0
Other	0.5	0.4	0.4	1.0	3.9
Unspecified	0.1	0.2	†	0.2	—
Total	8.5	5.9	4.4	31.6	34.3
July 1, 1971–June 30, 1972					
Hemorrhage	0.9	0.6	0.3	5.2	—
Infection	1.3	0.3	1.1	3.7	9.0
Perforated uterus	1.0	1.5	0.9	0.2	4.5
Anesthesia	0.1	0.1	0.1	—	—
Shock	†	—	—	†	—
Retained tissue	3.3	0.2	0.5	24.7	—
Failure	0.2	†	0.1	1.3	—
Lacerated cervix	0.2	0.2	0.2	0.1	—
Other	0.2	†	0.1	0.8	6.0
Unspecified	†	—	†	†	—
Total	7.2	3.0	3.2	36.1	19.5
July 1, 1970–June 30, 1972					
Hemorrhage	1.1	0.9	0.5	5.1	3.0
Infection	1.5	0.7	1.0	5.3	11.9
Perforated uterus	1.2	1.6	1.1	0.2	5.9
Anesthesia	0.1	0.1	0.1	0.1	0.6
Shock	†	†	†	0.1	0.6
Retained tissue	2.9	0.4	0.5	20.1	1.2
Failure	0.3	†	0.1	2.3	—
Lacerated cervix	0.2	0.3	0.2	0.1	0.6
Other	0.3	0.2	0.2	0.9	4.7
Unspecified	†	0.1	†	0.1	—
Total	7.7	4.3	3.7	34.2	28.5

* Note: Source of information: Weekly Reports.
† Less than 0.05.

Source: Pakter et al., "A Review of Two Years' Experience in New York City With the Liberalized Abortion Laws," reproduced in The Abortion Experience, Psychological & Medical Impact, 47, 61 (H. Osofsky & J. Osofsky ed. 1973).

D. Recidivism Rate Associated With Performance of Abortions on Adolescents

37. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

Data have accumulated on the recidivism rate for unwanted pregnancy and its relationship to nonuse of contraceptives. Sarrel[4] reported in a study of teen-age pregnancy that of 63 primigravidas [persons experiencing their first pregnancies] who delivered an infant out of wedlock in 1963, 36 delivered another in 1964. In a follow-up of 100 teen-age (13- to 17- year old) unwed mothers over a five year period, he found a total

Note: The footnoted reference is

4. Sarrel, P. "The University Hospital and the Teen-age Unwed Mother," 57 American Journal of Public Health 8:1308 (1967).

of 349 pregnancies and nine abortions (1959-1964); only five girls did not become pregnant again . . . .

We have defined the adolescent as a person at high risk, because of psychological, developmental and family issues which seem to be etiological in the pregnancy and which produce a high recidivism rate . . . .

Source: Nadelson, "Abortion Counselling: Focus on Adolesent Pregnancy," 54 Pediatrics 6: 765, 765-66 (1974).

38. In a study of 150 unwed girls residing in four maternity homes in Los Angeles the investigators reported on the incidence of

repeat unwed pregnancy as quoted below. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

Table IX. Incidence of repeat unwed pregnancy. Answer to question, "Is this your first pregnancy?"

	St. Anne's	Booth	Big Sister	Crittenton	Total	%
Yes	41	50	17	27	135	91.7
No	3	4	7	-	14	9.3

One startling point to come out of this study is revealed in Table IX. We are aware of the variability of the incidence of repeat unwed pregnancies and the difficulties in obtaining accurate figures. We have felt that

incidence was under 5 per cent. Hence, we were quite unprepared for this figure of 9.3 per cent "repeaters" in a random sample of 150 unwed pregnancies . . . .

Source: Von Her Ahe, "The Unwed Teen-age Mothers," 104 American Journal of Obstetrics and Gynecology 2: 279, 282, 284 (1969).

39. In a study of fifty women receiving abortions at the University of California-San Francisco, the investigators reported on the incidence of previous induced abortions as quoted below. With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:

PRIOR PREGNANCIES

None	19
Term or premature delivery	25
Spontaneous abortion only	1
Induced abortion	6

Source: Margolis et al., "Therapeutic Abortion Follow-up Study," 110 American Journal of Obstetrics and Gynecology 2:243, 244 (1971).

E. Facts Related to Juvenile And Adolescent Pregnancies.

40. In a recent sociological study, the author reported statistics

concerning the living arrangements of the adolescent at the time of her pregnancy as compared with her classmates. This data is quoted below. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

Table 2. Percent Distribution Of Adolescent Mothers and Classmates by Selected Characteristics, Baltimore, 1966-1972

Characteristics	Adolescent mothers (N= 323)	Classmates (N= 221)
Living arrangements of unmarried adolescents at Time:		
Lived with both parents	51	59
Lived with mother	38	32
Lived with father	3	2
Lived with neither parent	8	7

Source: Furstenberg, "The Social Consequences of Teenage Parenthood," 8 Family Planning Perspectives 4:148, 149 (1976).

41. In a follow-up study of fifty adolescent females done two years after their abortions, the investigators reported the incidence of households without a father present as quoted below. With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:

> The girl's father was absent in 37% of instances; nine fathers had been absent before the abortion, four because of death and five because of separation.

Source: Cvejic, et al., "Follow-up of 50 Adolescent Girls 2 Years After Abortion," 116 Canadian Medical Association Journal 1:44, 44 (1977).

42. In a paper discussing pregnancy resolution decisions of adolescents, the author compared several aspects of the home situation of deliverers and aborters. Included in that discussion was the following quote. With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:

Previous studies have frequently indicated that the "absent father" is a crucial causative factor in illegitimate pregnancy,[10,11] but failed to take into account the reason for his absence from the home. This oversight may be a critical one, since the present study showed that although

Note: Footnoted references are

10. Banglow, Peter, et al., "Some Psychiatric Aspects of Illegitimate Pregnancy in Early Adolescence," 38 American Journal of Orthopsychiatry, 672-687 (1968).

11. Gottschalk, L.A., et al., "Psychosocial Factors Associated with Pregnancy in Adolescent Girls: A Preliminary Report," 138 Journal of Nervous and Mental Disease, 524-534 (1964).

half of <u>both</u> deliverers' and abortors' homes had no father, a significant proportion of the aborters reported that their absent fathers were dead, whereas the deliverers' fathers were more likely to be living elsewhere. One of every four aborters claimed that her father was deceased, or twice the number reported by the deliverers.

Source: Ficshman, "The Pregnancy-Resolution Decision of Unwed Adolescents," 10 Nursing CLinics of North America 2:217, 220 (1975).

43. Pregnancies in girls under 16 years of age have become more common in recent years.
44. The number of female adolescents who delivered their first child in Boston City Hospital increased by 45 per cent between 1953 and 1956.

45. As of 1968, one half of all obstetric cases involved patients less than 20 years of age.

46. The following table summarizes the distribution of pregnancies in girls under 16 years of age as determined by twelve studies conducted between the years 1935 and 1967. With respect to this table, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

Table 49. Age Incidence of Pregnancy in Adolescents under 16 Years of Age (12 Series of Cases)

Reporter	Year	Age: Under 11	11	12	13	14	15	16	
Aznar & Bennett	1961	0	0	1	19	99	312	(662)	
Briggs et al.	1962	0	0	3	7	26	77	(88)	
Clough	1958	0	0	0	1	8	47	(119)	
Hacker et al.	1952	0	0	4	12	52	141	(281)	
Marchetti & Menaker	1960	0	0	12	19	77	163		
Morrison	1953	0	0	4	39	165	467		
Posner & Pulver	1935	0	0	2	10	26	62		
Poliakoff	1958	0	0	3	11	77	208		
Semmens & McGlamory	1960	0	1	0	7	16	88	(171)	
Sinclair	1952	0	0	1	3	47	168	(481)	
Clark et al.	1962	1	0	1	8	31	80	(170)	
Clark et al.	1967	0	2	5	14	50	109	(220)	
No. each age		1	3	36	150	674	1822	(2192)	
Total pregnancies under 16 years of age									2686*

*Total does not include 16 year olds.

47. The following table records the incidence and outcomes of juvenile pregnancies in girls under eleven years of age. With respect to this table, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

48. The author of the medical textbook from which the table appearing in paragraph forty seven is reproduced included in his discussion of juvenile pregnancy

Table 51. 21 Juvenile Pregnancies under 11 Years of Age

Reporter	Year	Child's Age		Type of Delivery	Condition of Offspring
		At Menarche	At Delivery		
von Mandelseo	1658	3	6-7/12	—	—
Sue	1779	2	8-9/12	—	Stillborn
von Haller	1784	2	8-9/12	Forceps	Stillborn
de la Sagra	1821	10	10-9/12	—	—
d'Outrepont	1826	-	9	Aborted	3 months
Carus	1842	2	8	—	—
Smith	1848	2	8-10/12	Normal	Stillborn
Rowlett	1834	1	10	Normal	Normal
Curtis	1863	9	10-8/12	Normal	—
Molitor	1878	4	8-9/12	Aborted	3 months
Dodd	1881	1	9-8/12	—	Neonatal death
Dodd	1882	1	8-10/12	—	Born with pubic hair and large breasts
Gleave	1895	5	10-1/12	—	Neonatal death
Pittman	1908	-	9	—	—
Chaschinsky & Jerschow	1933	3-4	6-9/12	—	Stillborn
Keane	1933	-	6-8/12	—	—
Comby	1938	3	8-3/12	—	—
Escomel	1939	8 mo.	5-8/12	Cesarean Section	Normal
Colareta	1957	-	9-8/12	Normal	Normal
Dodge	1958	8-6/12	9-6/12	Normal	Normal
Clark et al.	1962	-	10	—	—

several comments about the data included in the table. Included in that discussion was the following quote.

With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgment and opinions:

> Undoubtedly, there are more than those [juvenile pregnancies] noted, particularly in the 10 year old group.

Source for statements contained in paragraphs 43-48: J.W. Huffman, the Gynecology of Childhood and Adolescence, ch. 27, W.B. Saunders (1968).

49. Girls as young as nine years of age have sought birth control advice from Planned Parenthood clinics.

Source: Interview with Dr. Gerry Oliva, medical director of Planned Parenthood affiliate in San Francisco, California, reported in Los Angeles Herald-Examiner, October 25, 1975, p.-A-3, col. -1.

II. EXPERT OPINION CONCERNING ASPECTS OF PREGNANCY AND ABORTION EPISODES EXPERIENCED BY FEMALE ADOLESCENTS.

A. Adolescent Attitudes Towards Pregnancy And Abortion

1. General Psychological Observations

50. In a study comparing psychological sequelae of abortion in women who did not plan to have more children with women who hoped to bear children in the future, the investigators made several findings concerning the attitudes of the women toward their abortions. Included among these findings were those quoted below. With respect to the following

quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

The data suggest that, for the woman who plans to have children, abortion is an ambivalent

event . . . . [I]t is suggested that the ambivalence of women who have abortions while still planning for children in the future is of clinical importance. [emphasis in original].

Source: Greenglass, "Therapeutic Abortion, Fertility Plans, and Psychological Sequelae," 47 American Journal of Orthopsychiatry 1: 119, 119, 124 (1977).

51. In a study comparing the psychological sequelae of abortion in women who did not plan to have more children with women who hope to bear children in the future, several differences bewteen the two groups were noted. Included among these differences were those quoted below.

With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

The situation is far different, however, for women who opt for

abortion because of overwhelming immediate circumstances, but who hope to bear children in the future. Their conflict seems likely to result in some psychological discomfort, which would subsequently be manifested in various neurotic tendencies or reactions.

Source: Greenglass, "Therapeutic Abortion, Fertility Plans, and Psychological Sequelae," 47 American Journal of Orthopsychiatry 1: 119, 120 (1977).

2. Observations Concerning Psychology of Adolescence

52. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

1. Adolescents tend to show a special intensity and volatility of feeling. Certain of their emotions are extremely strong and extremely changeable.

2. Closely allied to his intensity of feeling is the adolescent's need for frequent and immediate gratification.

3. Reality testing is not as effective in the adolescent as in the adult. The adolescent is particularly likely to be unaware of the probable consequences of his actions and to misunderstand the feelings or behavior of others . . . .

If we examine the failures of reality testing, we find them to be limited to situations in which the adolescent's relation to a parent or parent substitute is of primary importance.

4. There is in adolescence a failure of self-criticism. This is perhaps only a special instance

of the failure of reality testing. This quality is best described as an inability to take another person's point of view and thus "get off and look at oneself." It is one of the factors permitting the adolescent to behave and feel in an impulsive, immoderate, and unrealistic way.

5. The adolescent has unawareness of the world about him different from that of the adult.

Source: Fountain, "Adolescent Into Adult: An Inquiry," 9 Journal of the American Psychoanalytic Association 417, 419-22, 426 (1961).

53. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

During adolescence, the physiological and maturational changes which occur lead to extremely strong emotional reactions . . . [and the adolescent] lacks experience with

her feelings and does not have the emotional control of an adult.

Source: Gedan, "Abortion Counseling with Adolescents," 74 American Journal of Nursing 10: 1856, 1856 (1974).

54. In a follow-up study of forty adolescents performed one month or more after their abortions, the investigators drew several conclusions. Included among these conclusions was the one quoted below.
With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a

reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

What is specific to this age group is the lessened amount of adaptive mechanism with which to deal with these problems.

Source: Rosenthal and Rothchild, "Some Psychological Considerations in Adolescent Pregnancy and Abortion," 9 Advances in Planned Parenthood 3-4: 60, 68 (1975).

55. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

When we see an adolescent or young adult, we are seeing an

individual in painful and extended crisis . . . . In the crisis of pregnancy, the potential for regression or maturation is particularly dramatic.

Source: Polsby, "Unmarried Parenthood Potential for Growth," 9 Adolescence 34: 273, 275, 277 (1974).

3. Observations Concerning Psychological Effects of Abortions on Adolescents.

56. With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a

reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Immediately available abortion may prevent some adolescents from accepting the reality of the pregnancy and working through a decision. The implications of this availability include the psychological toll of the denial, as well as the more pragmatic aspect that it may be less likely that a girl who had difficulty

acknowledging her sexuality, and has denied pregnancy will be able to accept the responsibility of contraceptive use to prevent future pregnancies.

This problem is brought into sharper focus by the large numbers of outpatient abortion facilities which do not have adequate preabortion counseling, and concern themselves with rapid turnover and large numbers of abortions, rather than quality care.

Source: Nadelson, "Abortion Counselling: Focus on Adolescent Pregnancy," 54 Pediatrics 6: 765, 768 (1974).

57. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

PREABORTION ANXIETY

A period of intense anxiety and ambivalence is often experienced in the 24-hour period of time prior to the abortion.

Source: Nadelson, "Abortion Counselling: Focus on Adolescent Pregnancy," 54 Pediatrics 6:765, 768 (1974).

58. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and

represent generally accepted professional judgments and opinions:

AMBIVALENCE

Ambivalence is universal. It is related to the conflict between the positive aspects of conception and pregnancy versus the frustration and sadness about making a choice to terminate a pregnancy. Since ambivalence occurs as part of the developmental process of adolescence, it is especially prominent in this age group, and it is more difficult to assess its particular significance.

Source: Nadelson, "Abortion Counselling: Focus on Adolescent Pregnancy," 54 Pediatrics 6: 765, 767 (1974).

59. With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

For the adolescent, failure of resolution of the unwanted

pregnancy crisis can potentially arrest development progress. The message of pregnancy must be understood and taken seriously if repetition is to be avoided. It is important to remember that the pregnant adolescent is a child potentially bearing a child.

Source: Nadelson, "Abortion Counselling: Focus on Adolescent Pregnancy," 54 Pediatrics 6:765, 769 (1974).

4. Observations Concerning Adverse Psychological Effects of Abortion on Adolescents.

60. In a study of the postabortion courses of twenty-two unmarried pregnant adolescent females, the investigators made several findings concerning the

psychological and physical status of the girls following their abortions. Included among these findings were those quoted below. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Our single most striking set of findings relates to the effects of the pregnancy and abortion experience upon the younger adolescents in the 14- to 17-year age span. Consequent sympton manifestations, even when only transient, tended to be more dramatic and more severe in this younger group. For example, we found here withdrawal from social relationships, preoccupation with feelings of "ugliness," severe crying spells upon seeing children or pregnant women, increased dependency on parents, radical changes in relationship patterns, one suicide attempt, and several fairly acute anniversary reactions. Even more, we were struck by the more pervasive long-range effects of the pregnancy and abortion experience upon these particular young women . . . .

Source: Wallterstein, et al., "Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women," 27 Archives of General Psychiatry 6: 828, 832 (1972).

61. In a study of the postabortion courses of twenty-two unmarried adolescent females, the investigators made several findings concerning the psychological and physical status of the girls following their abortions. Included among these findings were those quoted below. With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a

reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

[Some girls] . . . were clearly thrown off their previous developmental course in ways which carried ominous implications for their prospects of achieving a consolidated adult integration and regained self-esteem as a woman.

Source: Wallerstein, et al., "Psychosocial Sequelae of

Therapeutic Abortion in Young Unmarried Women," 27 Archives of General Psychiatry 6: 828, 832 (1972).

62. In a study of the postabortion courses of twenty-two unmarried pregnant adolescent females, the investigators made several findings concerning the psychological and physical status of the girls during their pregnancies and abortion decision episodes. Included among these findings were those quoted below. With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

In accordance with the findings of others,[1] an overwhelming number (specifically, 19 out of the 22),

Note: The footnoted reference 1 is:

Marder, "Psychiatric Experience with a Liberalized Abortion Law," 126 American Journal of Psychiatry 1230-1235 (1970).

reported experiencing moderate to severe emotional distress during the period of pregnancy.

Source: Wallerstein, et al., "Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women," 27 Archives of General Psychiatry 6: 828, 832 (1972).

63. With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Overall it is clear that the pregnancy and abortion experience in the younger and less mature is considerably heightened risk [sic], a point of potential major maturational skewing.

Source: Wallerstein, et al., "Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women, "27 Archives of General Psychiatry 6: 282, 832 (1972).

5. Observations Concerning Pre and Post Abortion Relationships Between Parents and Their Pregnant Adolescent Children.

64. In a paper discussing the psychological aspects of pregnancy and abortion in adolescents, the author discussed the adolescent's motivation for becoming pregnant. Included in that discussion were the comments quoted below. With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

The primary motivation for her was rather the wish to become closer to her own mother by <u>becoming a mother herself</u> . . . [emphasis in original]. Motherhood, therefore, is not the goal of the early adolescent female, but rather reuniting with her own mother by becoming like her is a significant motivation for pregnancy at this stage.

Source: Hatcher, "Understanding Adolescent Pregnancy and

Abortion," 3 Primary Care 3: 407, 414-415 (1976).

65. In a study of the postabortion courses of twenty-two unmarried pregnant adolescent females, the investigators made several findings concerning the psychological and physical status of the girls during their pregnancies and abortion decision episodes. Included among these findings were those quoted below. With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

[For some of the girls] the central emotional issue revolved primary around their deception of their families and the burden of secrecy . . . . [W]e did find that where secrecy from the family was insisted upon, this burden of guilt was a continuing source of difficulty.

Source: Wallerstein, et al., "Psychological Sequelae of

Therapeutic Abortion in Young Unmarried Women," 27 Archives of General Psychiatry, 6:828, 829, 831 (1972).

66. In an article concerning abortion counseling with adolescents, an experienced psychiatric nurse-therapist presented an extensive discussion of her experience with counseling over 400 girls since the liberalization of abortion laws. Included in that discussion were the statements quoted below. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Fantasies about her parents' feelings may be exaggerated. Adolescents who are feeling particularly guilty may expect severe retaliation from parents. About 20 per cent of my patients have expressed fears of beating or being struck and, although there was a history of physical violence in a few of the families involved, such fears have proven unfounded.

Source: Gedan, "Abortion Counseling with Adolescents," 74 American Journal of Nursing, 10: 1856, 1857 (1974).

67. In a report of a follow-up study of fifty adolescent females that underwent an abortion at the adolescent clinic of the Montreal Children's Hospital, the investigators made several statements and conclusions. Among these statements and conclusions were those quoted below.
With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

> The decision-making process is the most difficult aspect of the experience for the girl, the family and the clinic . . . [footnote omitted]. Our hospital clinic requires parental consent for individuals under the age of 18 to undergo an operation. Much of the initial anxiety for the girl is related to having to tell her parents about the pregnancy.

We have found that the girl who makes her decision in collaboration with her parents seems to be the best prepared.

Source: Cvejic, et al., "Follow-up of 50 Adolescent Girls 2 Years After Abortion," 116 Canadian Medical Association Journal, 1:44, 45 (1977).

68. In a follow-up study of forty adolescents one month or more after their abortions, the investigators included the table reproduced below.
With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a

reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Who Wanted the Abortion?

Patient	Parent	Number
Refused	Strongly wanted	4
Reluctant coerced	Strongly wanted	3
Ambivalent	Wanted	7
Wanted	Wanted	17
Wanted	Reluctant	8
Wanted	Refused	1

Source: Rosenthal and Rothchild, "Some Psychological Considerations in Adolescent Pregnancy and Abortion," 9 Advances in Planned Parenthood, 3-4: 60, 65 (1975).

69. In a study of the short and long-term effects of abortion on the pregnant teenager carried out at the Adolescent Unit of the Montreal Children's Hospital, a chart and discussion of the data concerning various follow-up statistics included the findings quoted below.

With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Table 1—Data obtained at short-and long-term follow-up compared with pre-abortion status

	Pre-abortion	Post-abortion, up to 6 weeks	Post-abortion, 6 weeks to 1 year
Family support			
Present	38	39	47
Lacking	12	11	3

In 76% of cases the families supported the girls through the crisis period, but 24% did not. In 16% of the cases, follow-up of one year revealed an improvement in the relationship between the girl and her family.

Source: Lipper, et al., "Abortion and the Pregnant Teenager," 109 Canadian Medical Association Journal 852, 854-855 (1973).

6. Observations Concerning the Importance to Pregnant Female Adolescents of Counseling and Parental Involvement in Counseling.

70. In a chapter dealing with juvenile and adolescent pregnancies contained in the medical text The Gynecology of Childhood and Adolescence, the author presents the discussion of the management of pregnant adolescents quoted below.

With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct;

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in

the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

This discussion of treatment will be concerned with the management of pregnant adolescents as defined in Table 50 [13 to 16 years olds]. These girls tend to come from a poor environment and, because of inadequate nutrition, are usually in need of superior antepartum care. The diagnosis of pregnancy is an unmarried adolescent brings with it distress and fear. It is my custom, once I feel certain of the diagnosis, to ask the girl's mother to leave the examining room. In the presence of my nurse, I tell the patient why I think she is pregnant, have

her agree that she could be and suggest that she let me tell her mother.

In talking to the mother emphasis is placed on the girl's need for sympathy, understanding and gentleness. It is not a time for reproaches or upbraiding. Tender, loving care will do more than anything else to help her overcome the stress of the antepartum period. The adolescent girl is not prepared physiologically or psychologically for the load of pregnancy and she will need all the help she can get from her family, social workers, nurses and physicians not only during her pregnancy and labor but, also, during the period of adjustment afterward.

The social worker is an indispensible part of the team who cares for the girl. The family

situation is investigated and help is obtained, if necessary, in order that the patient may have an adequate diet and suitable home care. Often an interested caseworker can win the girl's confidence and do more than her family, whom she may tend to shut out, in helping her cope with the emotional problems related to her pregnancy.

Ideally, psychiatric consultation is available for both the girl and her mother. Unfortunately, many private patients withdraw from psychiatric help and many of the girls in the indigent group do not report for examination until they are almost through their antepartum course . . . .

Most unmarried adolescent private patients in urban areas go to some other locality for their

delivery. If they are going to do so, it is advisable for them to be under the care of their physician who is to deliver them by the 20th week of gestation. If an adolescent is to go to an institution for unmarried girls, the family physician may well want to investigate the obstetric standing of those who are on the staff of the institution to which she is going. Private patients who remain at home for delivery are seen outside regular office hours. Those who are under the care of a pediatrician will have confidence in him and are more likely to follow his guidance than they are that of an obstetrician who is a stranger. The obstetrician and pediatrician, in such a case, may well work together, the pediatrician taking

the lead in gaining the girl's cooperation and in directing most of her care . . . .

Source: J. W. Huffman, The Gynecology of Childhood and Adolescence 552-53, W. B. Saunders (1968).

71. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in

the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

PREABORTION COUNSELLING

Preabortion counselling is a crucial aspect of the abortion procedure [emphasis in the original].

Abortion Motivation

Who wants the abortion? It is not infrequent for an adolescent to be pushed by family or friends to make a decision when she is uncertain. The counsellor must help her to explore the nature of the pressures, so that she may make her own decision.

The adolescent who is involved in other critical developmental issues, may be desirous of an abortion because her family wants the opposite, or vice versa. These issues must be clarified. In addition, the counsellor must remember that the adolescent will continue to live with her family, so that helping her with her own decision is not enough. Work with the family is important in order (1) to avoid repetition of the unwanted pregnancy, which is most frequently a distress signal for th adolescent; and (2) to work out problems reflected by the mutual acknowledgment of the adolescent's sexuality.

Source: Nadelson, "Abortion Counselling: Focus on Adolescent Pregnancy," 54 Pediatrics 6: 765, 767 (1974).

72. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

The Supreme Court decision permitting abortion in the first

trimester of pregnancy has resulted in a shift from preabortion psychiatric counselling to quick turnover at the expense of quality care. Adolescent girls, a high-risk population, should have experienced, nonjudgmental counselling in order to: (1) work through their feeling about pregnancy so that they can be reach the best decision for themselves; (2) cope with stress, guilt, and ambivalence they feel; (3) understand the psychological reasons for their non-use of contraceptives and thus avoid future unwanted pregnancies; (4) improve family relationships; and (5) understand the procedure itself.

Source: Nadelson, "Abortion Counselling: Focus on

Adolescent Pregnancy," 54 Pediatrics 6: 765, 765 (1974).

73. In a follow-up study of forty-one girls in early adolescence carried out six months after their abortions, the investigators made several comments concerning the results of the study. Included among these comments was a discussion of the physician's role in the abortion decision making process as quoted below.
With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

The role of any physician, beyond making or confirming the diagnosis, should be to explore the patient's feelings and discuss the available alternatives. The patient and her parents should, then, consider further what decision they want to take, ideally involving the male partner and his parents.

Source: Perez-Reyes and Falk, "Follow-up After Therapeutic Abortion in Early Adolescence," 28 Archives of General Psychiatry, 120, 126 (1973).

74. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful

professional investigation and represent generally accepted professional judgments and opinions:

> Significant people in the adolescent's family must be included in some way in the counseling.... Skilled counseling can help the family grow and change.

Source: Gedan, "Abortion Counseling with Adolescents," 74 American Journal of Nursing, 10: 1856, 1857 (1974).

75. In a follow-up study of fifty women three to six months post-abortion, the investigators made several comments concerning the results of the study. Included among these comments was the statement about adolescents quoted below.

With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

> Of particular concern to us, however, are the pregnant girls under 18. Although our study group was small, we encountered a great deal of ambivalence and guilt. As a result, we fell that especially careful evaluation and counseling should be provided for them and their families. The alternative of a teen-ager carrying a pregnancy to term presents great difficulties for the teen-ager and her child, and the delicate balancing of risks often requires the most expert collaborative effort of physician, psychiatrist, and social worker.

Source: Margolis, et al., "Therapeutic Abortin Follow-up Study," 110 American Journal of Obstetrics and Gynecology," 2: 243, 246 (1971).

76. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

> Counseling of young pregnant girls and their sexual partners can assist them to reach mature,

> rational decisions by helping them to understand their motives for childbearing, focus on the realities of a given situation, and take into account their capabilities and feelings of responsibility. If a girl and/or her family are opposed to abortion solely because of misinformation or irrational fears, intensive counseling might enable them to accept the procedure, and thus achieve the postponement of motherhood.

Source: Fischman, "The Pregnancy - Resolution Decision of Unwed Adolescents," 10 Nursing Clinic of North America, 2: 217, 225 (1975).

77. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Emotional counseling is an essential part of care for the woman who elects to terminate her pregnancy.

Source: Gedan, "Abortion Counseling with Adolescents," 74 American Journal of Nursing, 10: 1856, 1856 (1974).

78. With respect to the following quotation, defendants requst that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted

professional judgments and opinions:

. . . appropriate psychological intervention during pregnancy and the post abortion period may provide the impetus for maturation to the next developmental stage and more responsible behavior.

Source: Hatcher, "Understanding Adolescent Pregnancy and Abortion," 3 Primary Care, 3: 407, 423 (1976).

79. With respect to the following quotation, defendants request that you admit that:
a. The quoted material actually appears in the cited journal as it is reproduced here;
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

The request for abortion or the abortion itself may represent an opportunity for simple psychotherapeutic intervention, which may be of vital importance to the woman's subsequent mental health.

Source: Raphael, "Psychosocial Aspects of Induced Abortion: Its Implications for the Woman, Her Family and Her Doctor: Part 1", 2 The

Medical Journal of Australia, 1: 35, 35 (1972).

80. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Morbidity is somewhat higher with mid trimester pregnancy termination including coagulation disturbances.[18,19] Mid trimester abortion is a more emotionally stressful experience, and adolescents are particularly prone to adverse psychological reactions. As it is often the

Note: The footnoted references are

18. Wentz, et al., "Methodology: Premature Pregnancy Termination," 28 Obstetrics and Gynecology Surveys, 2 (1973).

19. Youngs, et al., "The Johns Hopkins Adolescent Pregnancy Program," Urban Health - The Journal of Health Care in the Cities, at 40 (1975).

younger, more immature adolescents who delay in seeking professional help, supportive counselling is indicated during and after the procedure.

Source: Youngs and Niebyl, "Adolescent Pregnancy and Abortion," 56 Medical Clinics of North America, 9: 1419, 1426 (1975).

By their attorneys,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

_____

Garrick F. Cole

_____

Thomas R. Kiley

_____

Michael B. Meyer
Assistant Attorneys General
Government Bureau
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
727-1004

On the requests:
Lawrence Gottlieb
Student Intern

[Title omitted in printing]

First Amendment to Defendant's First Set of Requests for Admissions to Plaintiff Gerald Zupnick

To: Gerald Zupnick, M.D.
c/o Parents Aid Society, Inc.
673 Boylston Street
Boston, Massachusetts

Defendants have become aware of a typographical error in their First Set of Requests for Admissions to Plaintiff Gerald Zupnick filed on August 1, 1977. Defendants therefore request that you make the following change in the original Request for Admissions.

Paragraph No. 52, Part 5, which appears at the top of page 32 of the First Set of Requests for Admissions should read as follows:

5. The adolescent has an awareness of the world about him different from that of the adult.

By their attorneys,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

_____

Garrick F. Cole

_____

Thomas R. Kiley

_____

Michael B. Meyer
Assistant Attorneys General
Government Bureau
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617)727-1004

[Title omitted in printing]

Defendants' Motion for Leave
to Contact Members of Plaintiff Class

Defendants move that the Court issue an order in the form attached permitting them to contact members of the plaintiff class by means of the letter attached to this motion as an exhibit and marked "A" for the purpose of requesting their participation in the survey described in the letter and to be conducted through use of the instrument attached to this motion as an exhibit and marked "B". In support of their motion, defendants point out that the Code of Professional Responsibility, DR 7-104(A)(1) and EC 7-18, prohibit defendants'counsel from communicating with members of the class represented by counsel, and defendants assume that named plaintiffs' counsel represent absent mem-

bers of the class within the meaning of the Code's prohibitions. See generally 3B J. Moore, Federal Practice, 23.75 (2 ed. 1977).

Pursuant to Local Rule 12, defendants state that they do not wish to file a memorandum in support of this motion but would like to explain the purpose of the survey orally should the Court think such a presentation appropriate. In light of the pressing pre-trial schedule defendants are working under, they request that the Court give this matter as rapid consideration as possible.

By their attorneys,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Garrick F. Cole
Thomas R. Kiley
Michael B. Meyer
Assistant Attorneys General
Government Bureau

Department of the Attorney
General
One Ashburton Place
Boston, Massachusetts 02108
727-1004

DATED: August 1, 1977
August 1, 19'7

Dear

I am writing to request your participation in a survey which the Attorney General is conducting in relation to a pending civil action in the United States District Court for the District of Massachusetts. The name of the case is William Baird, et al. v. Francis X. Bellotti, et al., Civil Action No. 74-4992-F, and the major issue involved is the constitutionality of Mass. Gen. Laws Ann. ch. 112, § 12P (West Supp. 1977).

This survey seeks to determine the practice of selected health care facilities in the Commonwealth regarding requirements of parental consent for health care services delivered to minors (persons under eighteen years of age). While the Attorney General is aware of the general legal standards applicable to this area of hospital procedure, he believes that proper decision in the pending litigation requires more detailed knowledge of actual practice. It is this purpose, and no other, which this survey is designed to serve.

I have enclosed with this letter a survey questionnaire which I would appreciate your completing and returning to me, along with the requested documentary attachments, in the enclosed pre-addressed, pre-stamped envelope by August 15, 1977. The questionnaire generally requires yes or no or check mark answers. A few

questions require a written response, and I would appreciate your taking sufficient time to answer them in some detail. An instruction sheet is attached to the questionnaire, but, should you have a question which it does not answer, please feel free to call Lawrence Gottlieb, the member of our staff primarily responsible for the survey, at 617-727-1017.

Our intention is to preserve the confidentiality of the responses to this survey.

The Attorney General appreciates your willingness to assist the Commonwealth in this matter.

Sincerely yours,

Garrick F. Cole
Assistant Attorney
General

Enclosures

[Title omitted in printing]

PARENTAL CONSENT
REQUIREMENTS SURVEY

Instructions

1. Please be sure your answers are as accurate and complete as possible.
2. Please feel free to insert notations or comments wherever you feel they are appropriate.
3. Please mark any questions or portions of questions which are not applicable to your institution with the letters "NA".
4. You may, if you wish, attach additional sheets to this survey if you need more space to answer the questions completely.
5. This survey is not concerned with consent requirements for emergency procedures unless otherwise indicated.

6. Please attach to the end of the questionare copies of all consent forms used at your institution along with any administrative directives or instructions concerning consent procedures.

[Title omitted in printing]

PARENTAL CONSENT
REQUIREMENTS SURVEY

Questionnaire

1. Are there any parental consent requirements for the care of minors in effect at your institution?

ANSWER: Yes [ ] (1)
No [ ] (2)

2. At what age can a person give his or her own consent for all procuedures done at your institution?

ANSWER: _____ (3)

3. What are the parental consent requirements at your institution for the performance of the following procedures on persons under the age stated in your answer to No. 22?

Procedure	No Parental Consent Required	One Parent's Consent Required	Both Parents' Consent Required
Counselling and/or Psychiatric evaluation	☐ (4)	☐ (5)	☐ (6)
Physical Examination	☐ (7)	☐ (8)	☐ (9)
Pelvic Examination	☐ (10)	☐ (11)	☐ (12)
Prescription of Non-Psychotropic drugs	☐ (13)	☐ (14)	☐ (15)
Prescription of Birth Control drugs or devices	☐ (16)	☐ (17)	☐ (18)
Prescription of Psychotropic drugs	☐ (19)	☐ (20)	☐ (21)
Venipuncture	☐ (22)	☐ (23)	☐ (24)
Blood Donation	☐ (25)	☐ (26)	☐ (27)
Methadone maintenance	☐ (28)	☐ (29)	☐ (30)
Hospitalization	☐ (31)	☐ (32)	☐ (33)
Blood transfusion	☐ (34)	☐ (35)	☐ (36)
Liver biopsy, angiography, Or similar invasive diagnostic procedure	☐ (37)	☐ (38)	☐ (39)
Tonsillectomy or other Minor surgery	☐ (40)	☐ (41)	☐ (42)
Rhinoplasty or other elective cosmetic surgery	☐ (43)	☐ (44)	☐ (45)
Kidney donation or Transplant	☐ (46)	☐ (47)	☐ (48)
Amputation or other Disfiguring procedures	☐ (49)	☐ (50)	☐ (51)
Brain, heart, or other Major surgery	☐ (52)	☐ (53)	☐ (54)
Voluntary psychiatric Commitment	☐ (55)	☐ (56)	☐ (57)

4. Please list any procedures for which you require the consent of both parents before the prcedure may be done on a person under the age stated in your answer to No. 2.

5. What, if any, are the parental consent requirements at your institution for the performance of an abortion on a female adolescent under the age stated in your answer to No. 2?

6. What, if any, are the parental consent requirements at your institution for the sterilization of a person under the age stated in your answer to No. 2?

7. What, if any, are the exceptions to the general consent requirements at your institution with regard to emergency situations or other situations in which minors may consent to their own medical care?

8. What is the procedure at your institution for the care of minors in a non-emergency situation if the parents are not available?

9. What is the procedure at your institution for the care of minors in a non-emergency situation if the parents refuse consent?

10. What is the procedure at your institution for the non-emergency care of minors if the parents disagree among themselves as to whether to consent to a particular procedure for their minor child?

11. Please comment on the reasoning behind the parental consent requirements at your institution. Specifically, we are interested in why the requirements may differ for different procedures, why the consent of both parents may be required for some procedures, while only one parent's consent or no consent from parents may be required for other procedures, and what the reasoning is behind the consent requirements for abortions and sterilization for minors.

Please complete the information requested below, attach all consent forms, informed consent instructions, and similar documents to this page and return the questionnaire in the attached envelope to:

Garrick F. Cole
Assistant Attorney General
One Ashburton Place,
20th Floor
Boston, Massachusetts 02108

Name of Institution:

Address:

Chief Administrative Officer:

This Survey was
Completed by:

_____

Signature

Dated:

[Title omitted in printing]

ORDER

Defendants have moved for an order granting them leave to contact members of the plaintiff class for the purpose of requesting their participation in a survey concerning parental consent to medical and hospital procedures. The purpose of the survey is described in a letter attached and marked "A". The survey instrument defendants request permission to use is attached to this order and marked "B".

After consideration of defendants' motion, the Court ORDERS that:

defendants are permitted to contact members of the plaintiff class directly through the use of the letter and survey instrument attached to this order and to make whatever follow-up contacts may be necessary, either by telephone or

in person, to secure participation in the survey and completion of the survey instrument.

By the Court,

_____

_____

_____

Dated: August , 1977

[Title omitted in printing]

[ORDER DENYING]
DEFENDANTS' MOTION FOR LEAVE
TO CONTACT MEMBERS OF
PLAINTIFF CLASS

Defendants move that the Court issue an order in the form attached permitting them to contact members of the plaintiff class by means of the letter attached to this motion as an exhibit and marked "A" for the purpose of requesting their participation in the survey described in the letter and to be conducted through use of the instrument attached to this motion as an exhibit and marked "B". In support of their motion, defendants point out that the Code of Professional Responsibility, DR 7-104(A)(1) and EC 7-18, prohibit defendants' counsel from communicating with members of the class represented by counsel, and

defendants assume that named plaintiffs' counsel represent absent members of the class within the meaning of the Code's prohibitions. See generally 3B J. Moore, Federal Practice, ¶ 23.75 (2 ed. 1977).

* * * * *

8/2/77
Denied.
Freedman, J. (after conferring with Julian, J.).

(Title omitted in printing)

TO: Garrick F. Cole,
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts

Brian A. Riley, Esq.
40 Court Street
Boston, Massachusetts

Plaintiffs request the defendants and the defendant-intervenors within thirty (30) days after service of this request to admit, or in such shorter time as the Court may allow, for purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial the truth of the

following facts, or that the application of law to fact are true, or that the documents attached hereto are genuine:

1. A substantial number of females under the age of 18 are capable of forming a valid consent to an abortion procedure.

Source: Baird v. Bellotti, 393 F. Supp. 847, 855 (1975)

2. Informed consent is the giving of information to the patient as to just what would be done and its consequences.

Source: Planned Parenthood of Central Missouri v. Danforth, _____ U.S. _____, 96 S. Ct. 2831, 2840, ft. 8 (1976)

3. There are a very low percentage of complications or morbidity in the first trimester in the case of lawful as distinguished from illicitly performed abortions.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

4. Delaying the abortion decision or its effectuation can cause psychological and medical problems, especially as the minor approaches the end of the first trimester.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

5. There are no greater medical risks in the performance of abortion procedures upon minors than upon adults.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

6. Parental support is desirable when an unmarried minor is pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

7. An appreciable number of parents are not supportive when they discover or are informed that their unmarried daughter is pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

8. Some minors correctly fear that physical harm would come to them if one or both of their parents knew that they were pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

9. Some parents of pregnant minors would under no circumstances consent to an abortion for their daughters.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

10. Some parents would attempt to make their pregnant minor daughters enter into marriages the daughters do not want.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

11. Some minors do not want to inform their parents of their pregnancies because they do not want to cause their parents distress.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

12. Some parents would insist that their pregnant minors continue their pregnancies as a punishment or to teach them a lesson.

Source: Baird v. Bellotti, 393 F. Supp. 847, 854 (1975)

13. The incidence of sexual activity among minors is high and the consequences of such activity are frequently devastating.

Source: Carey v. Population Services International, _____ U.S. _____, 97 S. Ct. 2010, 2022 (1977)

14. Teenage motherhood involves a host of problems, including adverse physical and psychological effects upon the minor and her baby, the continuous stigma associated with unwed motherhood, the need to drop out

of school with the accompanying impairment of educational opportunities and other dislocations including forced marriage of immature couples and often acute anxieties involved in deciding whether to secure an abortion.

Source: Carey v. Population Services International, _____ U.S. _____, 97 S. Ct. 2010, 2022 (1977)

15. Abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low or lower than the rates for normal childbirth.

Source: Roe v. Wade, 410 U.S. 113, 150 (1973)

16. Morality rates for women are high when abortions are performed illegally.

Source: Roe v. Wade, 410 U.S. 113, 151 (1973)

17. Time, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months.

Source: Doe v. Bolton, 410 U.S. 179, 198 (1972)

Joan C. Schmidt
Law Offices of
Joseph J. Balliro
1 Center Plaza
Boston, MA 02108
227-5822
723-1980

[Title omitted in printing]

ANSWERS OF THE PLAINTIFF GERALD ZUPNICK TO DEFENDANTS' REQUEST FOR ADMISSIONS OF FACT

Plaintiff Gerald Zupnick answers defendants' request for admissions of fact as follows: (Because of the length of each request for admissions, plaintiffs have omitted the actual request and have set forth only the response.)

1. Dr. Zupnick admits the truth of the matters set forth in this request.

2. Dr. Zupnick admits the truth of the matters set forth in this request.

3. (a) through (h) Dr. Zupnick admits the truth of the matters set forth in this request.

4. Dr. Zupnick admits the truth of the matters set forth in this request.

5. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for the reasons that he is unable to derive the data set forth in this request from the stated sources.

6. Dr. Zupnick denies the truth of the matters set forth in this request for reasons that he has some knowledge regarding the subject matter of this request.

7. Dr. Zupnick denies the truth of the matters set forth in this request for reasons that he has some knowledge regarding the subject matter of this request.

8. (a) Dr. Zupnick admits the truth of the figures 153,484; 1,670; and 38,345, but denies the truth of the percentages 1.08% and 24.98%.

(b) Dr. Zupnick admits that 704 abortions were

performed but denies the truth of the percentage 0.46%.

(c) Dr. Zupnick admits the truth of the matters set forth in (c).

9. Dr. Zupnick denies the truth of the matters set forth in this request.

10. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

11. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he

believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

12. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

13. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

14. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability

to give an informed consent is not a direct function of chronological age.

15. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

16. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of

the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

17. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

18. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the

medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

19. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

20. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or

surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

21. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

22. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he

believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

23. Dr. Zupnick denies the truth of the matters set forth in this request.

24. Dr. Zupnick denies the truth of the matters set forth in this request.

25. Dr. Zupnick denies the truth of the matters set forth in this request.

26. Dr. Zupnick denies the truth of the matters set forth in this request.

27. Dr. Zupnick denies the truth of the matters set forth in this request.

28. Dr. Zupnick denies the truth of the matters set forth in this request.

29. Dr. Zupnick denies the truth of the matters set forth in this request.

30. Dr. Zupnick denies the truth of the matters set forth in this request.

31. Dr. Zupnick denies the truth of the matters set forth in this request.

32. Dr. Zupnick denies the truth of the matters set forth in this request.

33. Dr. Zupnick denies the truth of the matters set forth in this request.

34. Dr. Zupnick denies the truth of the matters set forth in this request.

35. Dr. Zupnick denies the truth of the matters set forth in this request.

36. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

36A. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

36B. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

36C. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

36D. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

37. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

(c) Dr. Zupnick admits the truth of the matters set forth in this request.

38. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

39. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason

that he has no personal knowledge of whether or not the factual statements are correct.

40. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

41. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

42. (a) Dr. Zupnick admits the truth of the matters set forth in this request (a).

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal

knowledge of whether or not the factual statements are correct.

43. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that the time period involved is not specifically set forth.

44. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no knoweldge of the facts alleged therein. Dr. Zupnick objects to this request on the ground that the admission sought is irrelevant to the subject matter of this action.

45. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request. Dr. Zupnick objects to this request on the ground that the admission sought is irrelevant to the subject matter of this action.

46. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

47. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

48. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

49. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request.

50. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

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that he has no personal knowledge of whether or not the factual statements are correct.

(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

51. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason

that he has no personal knowledge of whether or not the factual statements are correct.

(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

52. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

53. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

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56. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

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(c) Dr. Zupnick admits the truth of the matters set forth in this request.

(d) Dr. Zupnick admits the truth of the matters set forth in this request.

57. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

(c) Dr. Zupnick admits the truth of the matters set forth in this request.

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(d) Dr. Zupnick admits the truth of the matters set forth in this request.

59. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

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(d) Dr. Zupnick admits the truth of the matters set forth in this request.

60. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

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that he has no personal knowledge of these matters.

61. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

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62. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

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65. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

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66. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

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(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

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(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

70. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

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(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

71. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

(c) Dr. Zupnick admits the truth of the matters set forth in this request.

(d) Dr. Zupnick admits the truth of the matters set forth in this request.

72. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

(c) Dr. Zupnick admits the truth of the matters set forth in this request.

(d) Dr. Zupnick admits the truth of the matters set forth in this request.

73. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

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that he has no personal knowledge of these matters.

74. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason

that he has no personal knowledge of these matters.

75. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

76. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

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77. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

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(b) Dr. Zupnick admits the truth of the matters set forth in this request.

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(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

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(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

80. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick admits the truth of the matters set forth in this request.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

Joan C. Schmidt, Esquire
Law Office of Joseph Balliro
One Center Plaza
Boston, MA 02108
(617) 723-1980

DATED: August 17, 1977

[Title omitted in printing]

Plaintiffs' Response to Defendants' Motion to Determine the Sufficiency of Plaintiffs' Responses to Defendants' First Set of Requests for Admissions by Plaintiff Gerald Zupnick

The defendants served their Request for Admissions upon plaintiffs' counsel on August 2, 1977. In order that answers might be filed prior to the pre-trial conference, the Court ordered that the plaintiffs make their response to these requests by August 18, 1977.

This Request for Admissions consisted of over eighty (80) numbered requests, most with sub-requests, for a total of over two hundred (200) separate requests. The bulk of the requests consisted of excerpts, portions of medical texts or

journals. Some of these excerpts were statistical tables, while others consisted of parts of articles of varying lengths. The bulk of the requests gave either an excerpt or statistical tables, their sources, and then required that Dr. Zupnick respond to the following:

"a. the quoted material actually appears in the cited journal as it is reproduced here;

b. the journal in which the quoted material appears is a reliable medical or scientific authority;

c. the quoted material's factual statements are correct;

d. the quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional judgments and opinions."

Dr. Zupnick uniformly admitted sub-request (a). In those instances where Dr. Zupnick knew that the cited authority was of a sufficiently high caliber, he admitted to sub-request (b). In instances where Dr. Zupnick had not heard of the cited journal, he answered that he could not truthfully admit or deny them.

Defendants allege that his answers were erroneous as a matter of law, that plaintiffs had a duty to secure information to answer the requests, and that plaintiffs' answers were made in bad faith. Plaintiffs contest all these allegations for the reasons set forth below.

I. Lack of Personal Knowledge Where the Knowledge is Not Readily Attainable is a Sufficient Answer to a Request for Admissions.

Defendants cited to this Court the case of Lumpkin v. Meskill, 64 F.R.D. 673 (D. Conn. 1974) for the proposition that responses of "lack of personal knowledge" or "independent advice must be sought" are not proper answers to a request for admissions. Defendants go on to state that Lumpkin presents a mirror image of the problem now before this Court.

While plaintiffs agree that this case is strikingly similar to our own, we respectfully disagree with defendants' interpretation. In Lumpkin, the plaintiffs brought a desegregation action against the local school board and state officials. As a part of their case, plaintiffs compiled statistical tables concerning

racial distributions in the school district, and asked the defendant State to admit the validity of the statistics. The Answer of the State, that it could neither admit nor deny the validity of the study for lack of personal knowledge, was held to be deficient since the Court found that through reasonable inquiry the information necessary to form an opinion as to the validity of the statistics could be secured.

The Court founded its decision on the following factors:

1. That the researcher who compiled the dats was offered for deposition by the plaintiffs;

2. That the defendant could inspect the field notes and working papers of the researcher; Id. at 679.

Also relevant to that Court's determination would be the fact that the defendants could have conducted their own survey of their own school

district or at least made a random check to determine the accuracy of plaintiff's findings. The Court concluded that "the defendant is only being asked to secure such knowledge and information as are readily obtainable by it. Id. at 679.

The key to the Lumpkin decision is that the means of verifying the accuracy of the statistics was "readily available" to the defendants. In the instant matter, plaintiffs contend that not only is the information which would be required to fully respond to defendants' requests not "readily available," but it is almost impossible to secure, especially in the short time period allocated.

Defendants' requests contain over thirty (30) different sources of data and excerpts from medical journals and texts. None of the studies (with the

exception of those done by Dr. Nadelson, all of which were admitted) was done by either the plaintiffs or the defendants or anyone in their employ, as was the situation in Lumpkin.

Furthermore, in Lumpkin, the plaintiffs made their researcher available for deposition, and also offered his field notes and working papers to the defendants. Except for the source materials utilized in two requests, the Attorney General has steadfastly refused to provide the plaintiffs with even so much as copies of the documents from which the excerpts and tables were drawn. Plaintiffs have no possible way of verifying the data utilized and the quality of the research studies cited. In Lumpkin, only one study was involved; here there are thirty (30) or more. In Lumpkin, the researcher and his materials were available.

Here, even if plaintiffs attempted to do so, they could not possibly conduct any kind of investigation of these materials given the short time allowed, and given that the bulk of the research was done outside the Commonwealth, and that some of it was done outside the United States. Certainly, the means of forming a solid opinion concerning these thirty studies is not "readily available" to plaintiffs.

Plaintiffs further contend that defendants' requests would obligate the plaintiffs to conduct extensive studies regarding the opinions held by various medical doctors and other scientific experts. The defendants asked Dr. Zupnick to admit whether certain documents were from reliable medical or scientific authorities. Given the vast number of medical and scientific publications, it is natural that Dr. Zupnick (or any doctor) could

not be expected to be familiar with all of them. Other than taking his own scientific survey, there is no other means for him to determine whether, for example, "The Medical Journal of Australia" or the "American Journal of Orthopsychiatry" is considerd reliable by his colleagues. Likewise, to determine whether or not a given study represents the work of careful, professional investigation and whether or not the researchers' conclusions or opinions represent generally accepted professional judgments and opinions would be a monumental task. Surely, this result was not contemplated by the framers of Rule 36.

II. Defendants Should be Estopped From Denying the Validity of the Study Entitled "11 MILLION TEENAGERS" or From Going Forward with Their Motion to Determine the Sufficiency of Plaintiffs' Responses to Defendants' First Set of Requests for Admissions.

Plaintiffs would like to offer the study entitled "11 Million Teenagers" into evidence at the trial of this case. "11 Million Teenagers" was prepared by researchers affiliated with the Alan Guttmacher Institute of New York. This study is a compilation of the best research studies available today concerning teenage sexuality and pregnancy and is an attempt to organize all these diverse studies under one cover. Plaintiffs anticipate that this study would provide helpful background material to

this Court and, ultimately, to the United States Supreme Court. Much of the data contained in "11 Million Teenagers" was obtained from the Bureau of the Census, the Department of Health, Education and Welfare, the United Nations and other very reputable sources.

Defendants contend that they cannot stipulate to the admission into evidence of "11 Million Teenagers" because the "document is inadmissable for several reasons, including its irrelevancy, its lack of guarantees of trustworthiness and the fact that it contains statements that are hearsay and hearsay upon hearsay." Defendants' Memorandum of Law for Pre-Trial Conference, August 19, 1977, page 22.

What is surprising about defendants' hostility to the admission of "11 Million Teenagers" is that the defendants themselves have included

one request for admission with eight (8) separate sub-requests which are extracts from this same study. See Defendants' First Set of Requests for Admissions to Plaintiff Gerald Zupnick; August 1, 1977; request number 3a-h, pages 3 and 4. Defendants further have stated in their Memorandum in Support of Their Motion to Determine the Sufficiency of Plaintiffs' Responses, August 22, 1977, page 6, that their ". . . requests are comprised in large parts of extracts from known and respected medical texts and periodicals . . ." To the Attorney General, on one occasion, "11 Million Teenagers" is respectable enough to form the basis of a request to admit directed to the plaintiffs, and, on another occasion, it is classified by the defendants as an inaccurate and incompetent work.

Plaintiffs contend that the defendants should be forced to assume a consistent posture with regard to "11 Million Teenagers." If the study is a worthy subject of a request for admissions and excerpts of it are admitted into evidence via the vehicle of requests for admissions, then the defendants should be estopped from asserting the inadmissability of the study. On the other hand, if defendants persist in their assertions that "11 Million Teenagers" is an unreliable work, then it should be assumed that the other excerpts which are the subject matter of defendant's requests for admissions are also equally incompetent. Therefore, the defendants should be required to prove by testimonial evidence the validity of each study cited in the same way plaintiffs are now obliged to prove the validity of "11 Million Teenagers."

III. Plaintiffs Have Responded to Defendants' Requests in Good Faith.

Defendants contend that plaintiff Zupnick's responses were not made in good faith for three reasons. The first reason, the personal knowledge issue, has been answered in Section 1 of this response. The second reason, that plaintiff Zupnick refused to admit requests that were founded upon well-known texts and periodicals, is met in Sections 1 and 2. Thirdly, Dr. Zupnick is considered by the defendants to have acted in bad faith since according to the Attorney General's Office Dr. Nadelson "had already admitted many of the requests to which Zupnick either objected to or denied."

Plaintiffs can readily answer this third allegation of so-called bad faith by pointing out that experts

often disagree and their disagreement is not any indication of bad faith or of lack of expertise in their fields. Further, Exhibit A to defendants' motion suggests that Dr. Nadelson "admitted essential truth" to some fifteen (15) requests that Dr. Zupnick could neither admit nor deny. Taking for example Numbers 52, 53 and 54 of defendants' Request for Admissions, all of which Dr. Nadelson has presumably admitted, plaintiffs suggest that her admissions of essential truth are not so clear and so unambiguous as defendants assert. Attached to this response as Exhibit A are Dr. Nadelson's responses at her deposition to the questions contained in these Requests. Over and over Dr. Nadelson's answers demonstrate that yes or no answers are incorrect and inappropriate, and that further clarification, additions and amendments were necessary.

Defendants also give as an example of Dr. Zupnick's alleged bad faith his denial of Request No. 35, which reads that, "(n)o female 5 years old is able to give legally effective consent to medical or surgical procedures."

In answer to several earlier requests, Dr. Zupnick stated that "he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors, and further that the ability to give an informed consent is not a direct function of chronological age." Dr. Zupnick feels that to state that no female can give consent is very obviously incorrect for the reason that certain intellectually gifted children of 5 years can give consent to many procedures and that

the average 5 year old can give an informed consent to such simple emergency medical procedures as bandaging a cut or wound. Certainly for Dr. Zupnick to deny this request was entirely appropriate.

IV. Defendants' Requests for Admissions Are For the Most Part Not in Accord with the Requirements of Rule 36 of the Fed. R. Civ. P.

A. The majority of defendants Requests for Admissions should have been designated as requests to admit the genuineness of documents pursuant to Fed. R. Civ. P. 36 and copies of the entire documents should have been delivered to plaintiffs. Then, the documents in their entirety, if genuineness was admitted, could have gone into evidence.

Rule 36 provides a mechanism whereby documents can be admitted into evidence without the usual time-consuming procedure of having a live witness authenticate the document and explain its origins. Plaintiffs are decidedly uncomfortable with defendants' approach of excerpting parts of texts, and are of the opinion that a good study can speak for itself if presented in its entirety. Defendants' procedure of excerpting out portions of studies and articles leaves many questions unanswered, and could result in materials being quoted out of their proper context. Defendants' approach also leaves plaintiffs without the ability to introduce into evidence the remaining portions of these studies. Admissions stand alone and obviously cannot be cross-examined. Defendants should not be permitted to evade the clear intent of Rule 36 with respect to the treatment of documents.

Rule 36 further limits the scope of a request for admission with regard to documents to the genuineness of the particular document. Defendants' request that Dr. Zupnick admit facts and opinions contained in lengthy excerpts is another attempt to avoid the strictures of Rule 36. As stated by Professor Moore, "(t)he request for admission should be simple and direct and should seek admission of the genuineness of the document, not request an interpretation of its contents." 4A Moore's Federal Practice, 2nd Ed. 36.03(4) at 36-21. See also Jackson Buff Corp. v. Marcelle, 20 F.R.D. 139 (E.D.N.Y. 1957).

B. The majority of defendants' Requests for Admissions are improper in form and not in accordance with the requirements of Rule 36 of the Fed. R. Civ. P.

The rules concerning the form of requests for admissions are clear. Those rules were restated in Havenfield Corp. v. H & R Block, Inc., 67 F.R.D. 93 (W.D.Mo. 1973) at 96, where the Court held that:

> "(r)egardless of the subject matter of the Rule 36 request, the statement of the fact itself should be in simple and concise terms in order that it can be denied or admitted with an absolute minimum of explanation or qualification. 4A Moore's Federal Practice, 2nd Ed. 36.05(a) at 35-36. The request 'except in a most unusual circumstance, should be such that it (can) be answered yes, no, the answerer does not know, or a very simple direct

explanation given as to why he cannot answer, such as in the case of privilege."

The Havenfield Court went on to find that defendant's requests were "couched in general, unequivocal terms which appear to facilitate unequivocal admissions or denials." Id. at 97.

A cursory perusal of defendants' requests reveals that almost none of the requests could possibly be answered simply and unequivocally. Request No. 36 and 36A each cover two standard-size pages, single spaced. For Dr. Zupnick to respond to each fact and each separate opinion contained in these two requests alone would practically require Dr. Zupnick to write a book on each of these two excerpted articles. Dr. Nadelson's answers at her deposition (see Exhibit A) also demonstrate that simple answers cannot be properly made to these Requests.

Defendants have stated that plaintiffs do not understand Rule 36. Perhaps that is so, but it is also very obvious that defendants' comprehension of Rule 36 is at least equally limited.

C. The majority of defendants' Requests for Admissions are irrelevant to the issues to be tried by this Court on October 17, 1977.

At the pre-trial conference on August 22, 1977, agreement as to the issues left to be tried was reached between all parties to this litigation. The bulk of defendants' Requests for Admissions are irrelevant to these issues and were the subject of the prior trial of this case. For example, requests Nos. 9 through 35 are concerned with the ability of minors to give informed consent to medical or surgical procedures. Detailed evidence was presented on

this issue by all the expert witnesses and this Court made findings based on that evidence. Baird v. Bellotti, 393 F. Supp. 847, 855 (1975).

Other requests seem to be plainly irrelevant to any possible issue in this litigation. For example, in Requests Nos. 44 through 47, reference is made to data, none of which was gathered after 1968, which was well before abortion became legalized in Massachusetts. Plaintiffs doubt that any increase in the number of adolescents who delivered at Boston City Hospital between 1953 and 1956 or like data could have any rational bearing on the issues of teenage abortion in 1977.

V. Conclusion

For the foregoing reasons, the defendants' Motion to Determine the Sufficiency of Plaintiffs' Answers should be denied. If in the

alternative, if the Court feels that as to certain of the request plaintiffs' answers were inappropriate, plaintiffs would request additional time and also some guidance as to the extent of Dr. Zupnick's duty in answering.

Joan C. Schmidt
Law Office of
Joseph J. Balliro
One Center Plaza
Boston, Massachusetts 02108
723-1980

September 1, 1977

A It may, but not necessarily, though.

Q Could that conflict be manifested in subsequent neurotic tendencies or reactions?

A Could be.

Q Would you agree that adolescents tend to show a special intensity and volatility of feeling and that certain of their emotions are extremely strong and extremely changeable?

A Yes, that is true, but I think it is important to differentiate that one has to be careful about what age adolescent one is talking about.

Q Would you agree with the following statement: Closely allied to his intensity of feeling is the adolescent's need for frequent and immediate gratification?

A I'd make two comments: One is to "his," mostly because the research is on "his" and not "her," so

that the nature of female adolescent processes is less well-known. On the other score, yes.

Q What does "reality testing" mean in psychiatry?

A It means the ability to perceive a situation and realistically assess what its implications are. Usually it is used more related to some psychoses than anything else.

Q Would you agree with the following statement: Reality testing is not as effective in the adolescent as in the adult? An adolescent is particularly likely to be unaware of the probable consequences of his actions and to understand the feelings or behavior of others?

A That is generally more true of adolescents than adults.

Q Would you agree with the following statement: If we examine the failures of reality testing, we find them to be limited to situations

in which the adolescent's relation to a parent or parent substitute is of primary importance?

A That would be hard to answer without knowing the context in which that statement was made.

Q Would you agree with the following statement: There is in adolescence a failure of self-criticism. This is perhaps only a special instance of the failure of reality testing. This quality is best described as an inability to take another person's point of view and to get off and look at oneself. It is one of the factors permitting the adolescents to behave and feel in an impulsive, immoderate and unrealistic way?

A Yes, that is generally true, but not always true.

Q Would you agree with the following statement: The adolescent

has an awareness of the world about him different from that of an adult?

A Unawareness or an awareness?

Q Let me start that over again.

The adolescent has an awareness of the world about him different from that of the adult.

A Generally, yes.

Q Would you agree with the following statement: During adolescence the physiological and maturational changes which occur lead to extremely strong emotional reactions and the adolescent lacks experience with her feelings and does not have the emotional control of an adult?

A Again, generally, that is true, but not always, and also for younger adolescents than for older adolescents, as are all those statements.

Q Would you agree that as a general statement the following is

correct: What is specific of adolescence is the lessened amount of adaptive mechanism with which to deal with these problems -- referring to unwanted pregnancies or abortions?

A Could you restate that, please?

Q Certainly.

Would you agree that the following statement is generally correct: What is specific to this age group, referring to adolescence, is the lessened amount of adaptive mechanism with which to deal with these problems -- referring to unwanted pregnancies or abortions?

A There are two different problems there.

Q Would you agree with the first with respect to unwanted pregnancies?

A Yes.

Q Would you agree with the second with respect to the decision?

A It is not as clear.

Q Would you agree with the following statement: When we see an adolescent or young adult we are seeing an individual in painful and extended crisis. In the crisis of pregnancy, the potential for regression or maturation is particularly dramatic?

A That doesn't make sense.

Q Let's break it down.

A All right.

Q Would you agree with this part, first of all: When we see an adolescent or young adult we are seeing an individual in painful and extended crisis?

A All right.

Q You agree with that part?

A Yes.

Q The second part is: In the crisis of pregnancy the potential for regression or maturation is particularly dramatic.

[Title omitted in printing]

Defendant-Intervenor's Answer
to Plaintiffs' First Request
for Admissions

The defendant-intervenor answers plaintiffs' first request for admissions as follows:

1. QUESTION: A substantial number of females under the age of 18 are capable of forming a valid consent to an abortion procedure.

Source: Baird v. Bellotti, 393 F. Supp. 847, 855 (1975.)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further state that such matters are legislative facts if material.

2. QUESTION: Informed consent is the giving of information to the patient as to just what would be done and its consequences.

Source: Planned Parenthood of Central Missouri v. Danforth, _____ U.S. _____, 96 S. Ct. 2831, 2840, ft. 8 (1976)

ANSWER: The matters contained in this request are not appropriate for admission by any party because it concerns a question of law which as stated is incomplete and incorrect.

3. QUESTION: There are a very low percentage of complications or morbidity in the first trimester in the case of lawful as distinguished from illicitly performed abortions.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

QUESTION: Delaying the abortion decision or its effectuation can cause psychological and medical problems, especially as the minor approaches the end of the first trimester.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

5. QUESTION: There are no greater medical risks in the performance of abortion procedures upon minors than upon adults.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

6. QUESTION: Parental support is desirable when an unmarried minor is pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: The defendant-intervenor admits the truth of facts contained in this request.

7. QUESTION: An appreciable number of parents are not supportive when they discover or are informed that their unmarried daughter is pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: The defendant-intervenor denies that an "appreciable number of parents are not supportive when they discover or are informed that their unmarried daughter is pregnant."

8. QUESTION: Some minors correctly fear that physical harm would come to them if one or both of their parents knew that they were pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

9. QUESTION: Some parents of pregnant minors would under no circumstances consent to an abortion for their daughters.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct

and further states that such matters are legislative facts if material.

10. QUESTION: Some parents would attempt to make their pregnant minor daughters enter into marriages the daughters do not want.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

11. QUESTION: Some minors do not want to inform their parents of their pregnancies because they do not want to cause their parents distress.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

12. QUESTION: Some parents would insist that their pregnant minors continue their pregnancies as a punishment or to teach them a lesson.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of

whether or not such facts are correct and further states that such matters are legislative facts if material.

13. QUESTION: The incidence of sexual activity among minors is high and consequences of such activity are frequently devastating.

Source: Carey v. Population Services International, _____ U.S. _____, 97 S. Ct. 2010, 2022 (1977)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

14. QUESTION: Teenage motherhood involves a host of problems, including adverse physical and psychological

effects upon the minor and her baby, the continuous stigma associated with unwed motherhood, the need to drop out of school with the accompanying impairment of educational opportunities and other dislocations including forced marriage of immature couples and the often acute anxieties involved in deciding whether to secure an abortion.

Source: Carey v. Population Services International, _____ U.S. _____, 97 S. Ct. 2010, 2022 (1977)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

15. QUESTION: Abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low or lower than the rates for normal childbirth.

Source: Roe v. Wade, 410 U.S. 113, 150 (1973)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

16. QUESTION: Motality rates for women are high when abortions are performed illegally.

Source: Roe v. Wade, 410 U.S. 113, 151 (1973)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

17. QUESTION: Time, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months.

Source: Doe v. Bolton, 410 U.S. 179, 198 (1972)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of

whether or not such facts are correct and further states that such matters are legislative facts if material.

Respectively submitted,

JANE HUNERWADEL

By her attorneys,

_____

Brian A. Riley

_____

Mary Laura Russell
Suite 524
40 Court Street
Boston, Massachusetts 02108
(617)523-3240

[Title omitted in printing]

Defendants' Responses to
Plaintiffs' Requests for Admissions

Defendants Francis X. Bellotti, et al., respond as follows to plaintiffs' Requests for Admissions:

Request 1. A substantial number of females under the age of 18 are capable of forming a valid consent to an abortion procedure.

Source: Baird v. Bellotti, 393 F. Supp. 847, 855 (1975).

Response 1. Denied. Defendants admit that some females under eighteen are intellectually and emotionally able to comprehend tha matters which physicians must discuss with them before performing abortions, see Canterbury v. Spence, 464 F.2d 772,

782, 786-87 (D.C. Cir. 1972); cf. Schroeder v. Lawrence, Mass. Adv. Sh. 286, 289-91 (1977), but defendants deny that this ability is equivalent to having the legal capacity to give legally effective consent under Canterbury and Schroeder. See Baird v. Bellotti, 393 F. Supp. 847, 854 fn. 8 (1975).

Request 2. Informed consent is the giving of information to the patient as to just what would be done and its consequences.

Source: Planned Parenthood of Central Missouri v. Danforth, U.S. , 96 S. Ct. 2831, 2840, ft. 8 (1976).

Response 2. Denied. Defendants take the position that informed consent under Massachusetts law is consent within the meaning of the decision of

the United States Court of Appeals for the District of Columbia Circuit in Canterbury v. Spence, 464 F.2d 772, 782, 786-87 (D.C. Cir. 1972) as adopted and interpreted by the Supreme Judicial Court:

> [a person capable of granting "legally effective consent" to medical care is one who is competent to evaluate the information which a physician must provide to meet his duty to make] reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved . . . . [and the] test for determining whether a particular peril must be divulged is its materiality to the patient's decision:

all risks potentially affecting the decision must be unmasked . . . . Cf. Schroeder v. Lawrence, Mass. Adv. Sh. (1977) 286, 290 (referring to Canterbury v. Spence with respect).

Request 3. There are a very low percentage of complications or morbidity in the first trimester in the case of lawful as distinguished from illicitly performed abortions.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 3. Denied. Defendants admit that the complication rates are those shown in Defendants' First Set of Requests for Admissions, Nos. 36-36D.

Request 4. Delaying the abortion decision or its effectuation can cause psychological and medical problems, especially as the minor approaches the end of the first trimester.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 4. Admitted, with the qualification that "can cause" means that such problems may occur. Defendants make no admission as to the frequency of occurrence or magnitude of these problems.

Request 5. There are no greater medical risks in the performance of abortion procedures upon minors than upon adults.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 5. Denied. Defendants admit the truth of the specific data in Defendants' First Set of Requests for Admissions, No. 36C.

Request 6. Parental support is desirable when an unmarried minor is pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 6. Admitted.

Request 7. An appreciable number of parents are not supportive when they discover or are informed that their unmarried daughter is pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 7. Admitted, with the qualification that "appreciable number" means that such parents

exist. Defendants make no admission as to the frequency of occurrence or the magnitude of this phenomenon.

Request 8. Some minors correctly fear that physical harm would come to them if one or both of their parents knew that they were pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 8. Admitted, with the qualification that "some minors" means that such minors exist. Defendants make no admission as to the frequency of occurrence or the magnitude of this phenomenon.

Request 9. Some parents of pregnant minors would under no circumstances consent to an abortion for their daughters.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 9. Admitted, with the qualification that "some parents" means that such parents exist. Defendants make no admission as to the frequency of occurrence or the magnitude of this phenomenon.

Request 10. Some parents would attempt to make their pregnant minor daughters enter into marriages the daughters do not want.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 10. Admitted, with the qualification that "some parents" means that such parents exist. Defendants make no admission as to the frequency of occurrence or the magnitude of this phenomenon.

Request 11. Some minors do not want to inform their parents of their pregnancies because they do not want to cause their parents distress.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 11. Admitted, with the qualification that "some minors" means that such minors exist. Defendants make no admission concerning the frequency of occurrence or the magnitude of this phenomenon.

Request 12. Some parents would insist that their pregnant minors continue their pregnancies as a punishment or to teach them a lesson.

Source: Baird v. Bellotti, 393 F. Supp. 847, 854 (1975).

Response 12. Admitted, with the qualification that "some parents" means that such parents exist. Defendants make no admission concerning the frequency of occurrence or the magnitude of this phenomenon.

Request 13. The incidence of sexual activity among minors is high and the consequences of such activity are frequently devastating.

Source: Carey v. Population Services International, U.S. 97 S. Ct. 2010, 2022 (1977)

Response 13. Admitted.

Request 14. Teenage motherhood involves a host of problems, including adverse physical and psychological effects upon the minor and her baby, the continuous stigma associated with unwed motherhood, the need to drop out

of school with the accompanying impairment of educational opportunities and other dislocations including forced marriage of immature couples and the often acute anxieties involved in deciding whether to secure an abortion.

Source: Carey v. Population Services International, U.S. 97 S. Ct. 2010, 2022 (1977).

Response 14. Admitted.

Request 15. Abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low or lower than the rates for normal childbirth.

Source: Roe v. Wade, 410 U.S. 113, 150 (1973).

Response 15. Admitted.

Request 16. Mortality rates for women are high when abortions are performed illegally.

Source: Roe v. Wade, 410 U.S. 113, 151 (1973).

Response 16. Admitted, with the qualification that "high" means only "higher than when performed legally." Defendants make no admission as to the frequency of mortality.

Request 17. Time, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months.

Source: Doe v. Bolton, 410 U.S. 179, 198 (1972).

Response 17. Admitted.

By their attorneys,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

_____
Garrick F. Cole

_____
Thomas R. Kiley

_____
Michael B. Meyer
Assistant Attorneys General
Government Bureau
Office of the Attorney General
One Ashburton Place
Room 2019
Boston, Massachusetts 02108
(617)727-1004

Dated: September 14, 1977

[Title omitted in printing]

Stipulation

[Concerning Defendants' Requests for Admissions]

The parties to the above-captioned action stipulate as follows:

1. The following Requests for Admissions by Gerald Zupnick, filed by defendants, are admitted in addition to the Requests for Admissions previously admitted:

36A (b), (c), (d)
36B (b), (c), (d)
36C (b), (c), (d)
36D (b), (c), (d)
38 (c)
39 (c)
40 (c)
41 (c)
42 (b), (c)
43
44
45
46 (b), (c)

49
53 (b), (c), (d)
55 (b), (c), (d)
67 (c), (d)
69 (c), (d)
70 (b), (c), (d)
73 (c), (d)
76 (b), (c), (d)
78 (c), (d)
79 (b), (c), (d)
47 (b), (c)
48 (b), (c), (d).

2. Defendants agree that Requests for Admissions 10-35 are denied.

_____

Joseph J. Balliro, Esq.

_____

Michael B. Meyer, Esq.

_____

Brian Riley, Esq.

_____

John H. Henn, Esq.

October 18, 1977

[Title omitted in printing]

Order

[On Request for Admissions]

November 14, 1977

After careful consideration of the defendants' requests for admissions and the plaintiffs' responses thereto, as well as the memoranda submitted by counsel, the Court denies the Defendants' Motion that Defendants' Requests for Admissions be Deemed Admitted. The Court has concluded that the admission of the requests in question would be prejudicial to the plaintiffs' case. Accordingly, the following requests for admissions are not deemed by the Court to be admitted: 5; 36(c); 50(c), (d); 51(c), (d); 52 (c), (d); 54(b), (c), (d); 60(c), (d); 61(c), (d); 62(c), (d); 63(c), (d); 64(c), (d); 65(c), (d); 66(b), (c), (d); 68(b), (c), (d);

74(b), (c), (d); 75(c), (d); 77(b), (c), (d); and 80(c), (d). The plaintiffs and amici no longer challenge requests for admissions 50(b) and 51(b). These are therefore deemed admitted.

The Court reserves the right at this point to assess costs against the plaintiffs if it determines at some future time that the plaintiffs' actions have been unreasonable.

In view of the Court's disposition, the defendants shall inform the Court in writing within seven (7) days whether they wish to reopen the evidence in order to present additional matters or to rest their case on the evidence already presented. If the defendants choose the former alternative, they are requested to provide the Court with an estimation of the time so needed and

which specific requests for admissions will be involved in reopening the evidence.

It is so ORDERED.

s/Baily Aldrich
Senior Circuit Judge

s/Anthony Julian
Senior District Judge

s/Frank H. Freedman
District Judge

[Letterhead omitted in printing]

Correspondance Among Counsel and Related Documents Concerning Immature/Mature Minor Issue

November 9, 1977

Joseph J. Balliro, Esq.
One Center Plaza
Boston, Massachusetts 02108

Re: Baird v. Bellotti
USDC Civil Action
No. 74-4992-F

Dear Mr. Balliro:

Upon reviewing the transcript of the trial of the above-captioned case, I recalled that the Court indicated (at II-192, 194) that plaintiffs should inform all parties whether their challenge to G.L. 112, § 12S includes or excludes immature minors.

Accordingly, please inform the Attorney General in writing whether you plan to argue in you post-trial brief that § 12S is unconstitutional on its face with respect to its effect upon immature minors.

I appreciate your attention to this matter.

Very truly yours,

Michael B. Meyer
Assistant Attorney General

cc: Brian A. Riley, Esq.
John H. Henn, Esq.

[Letterhead omitted in printing]

November 16, 1977

Michael B. Meyer
Assistant Attorney General
One Ashburton Place
Boston, Mass. 02108

Re: Baird v. Bellotti

Dear Mr. Meyer:

You have inquired of us in your letter of November 9, 1977 as to our position as to the scope of M. G. L. c. 112 § 12S with regard to so-called "immature minors".

It is the plaintiff's position that "immature minors" is not a term of art. The statute speaks in terms of the "consent" of the mother.

Inherent in the term consent is the capacity to give that consent and it is our position that the only limitation that can be placed on a minor consenting to an abortion is her capacity to give that consent. If by "immature minor" you limit your definition to one incapable of giving consent, we have no trouble with that phrase or any other you choose to describe one unable to give consent.

Very truly yours,

Joseph J. Balliro

cc: Brian A. Riley, Esq.
John H. Henn, Esq.

[Letterhead omitted in printing]

November 17, 1977

Joseph J. Balliro, Esq.
One Center Plaza
Boston, Massachusetts 02108

Re: Baird v. Bellotti
USDC Civil Action
No. 74-4992-F

Dear Mr. Balliro:

Thank you for your letter of November 16, 1977.

If we assume for the purposes of this question that "immature minor" means a minor who is unable to give legally effective consent, please inform the Attorney General in writing whether you plan to argue in your

post-trial brief that § 12S is unconstitutional on its face with respect to its effect upon immature minors.

I appreciate your continued attention to this matter.

Very truly yours,

Michael B. Meyer
Assistant Attorney General

cc: Brian A. Riley, Esq.
John H. Henn, Esq.

[Letterhead omitted in printing]

November 18, 1977

Michael B. Meyer, Esquire
Attorney General's Office
McCormack Building
One Ashburton Place
Boston, Massachusetts

Dear Mr. Meyer:

Re: Baird v. Bellotti
USDC Civil Action
No. 74-4992-F

I have your letters of November 9 and 17, and Mr. Balliro's of November 17 concerning the issue of the facial invalidity of § 12S. It is the position of amici that § 12S is invalid on its face -- period. This is so, as plaintiffs and amici have

argued, and the evidence has shown at trial, because the statute's third-party consent requirements are unduly burdensome, and discriminate against the right of a mature minor woman to terminate her pregnancy. The fact that some minors are unable to give legally effective consent to termination of their pregnancies, and thus always require some form of third party consent in a variety of contexts, does not save this overbroad statute, nor suggest to us any narrowing and constitutionally acceptable construction.

Yours sincerely,

John H. Henn

[Letterhead omitted in printing]

November 28, 1977

Michael B. Meyer
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108

Re: Baird v. Bellotti

Dear Mr. Meyer:

In response to your inquiry of November 17, 1977, this is to advise you that what we intend to argue is that M. G. L. c. 112 § 12S is unconstitutional in that it limits a minor capable of giving consent from giving that consent to an abortion.

If you insist on using the term "immature", I repeat, as I noted to you in my letter to you dated November

16, 1977, that I do not consider that term to be one of art. In short, we intend to write our brief in response to the terms used by the statute itself.

Very truly yours,

Joseph J. Balliro

cc: Brian A. Riley, Esq.
John H. Henn, Esq.

[Title omitted in printing]

Memorandum and Order

[On Immature/Mature Minor Issue]

November 29, 1977

In response to defendants' motion for compliance filed November 28, 1977, and a review of the record, the court agrees with defendants that Mr. Balliro's letter of November 16, 1977 is not altogether clear. It does find Mr. Henn's letter of November 18 to be clear, and adequate. Mr. Balliro is ordered to make further response, within five days of the date hereof.

s/Baily Aldrich
Senior Circuit Judge
s/Anthony Julian
Senior District Judge
s/Frank H. Freedman
District Judge

[Title omitted in printing]

Plaintiffs' Further Response
to the Order of the Court Dated
November 29, 1977

In response to the Court's Order, plaintiffs state that: Plaintiffs will argue that Mass. Gen. Laws Ch. 112 § 12S is unconstitutional with regard to those minors who are capable of giving consent to an abortion, and will not argue that it is unconstitutional with regard to minors who are not covered by the express terms of the statute, i.e., those minors who are not capable of giving consent.

By their attorney,

_____

Joseph J. Balliro
65 East India Row, 30F
Boston, Massachusetts 02110
227-5822
December 5, 1977

[Letterhead omitted in printing]

[Correspondance and related documents concerning Planned Parenthood, et al's post-trial arguments]

December 23, 1977

Clerk, United States
District Court
Room 1525
U.S. Post Office and Courthouse
Boston, Massachusetts 02109

Re: Baird v. Bellotti,
Civil Action No. 74-4992-F

Dear Sirs:

Would you please advise the Court that amici do not intend to burden the Court with an elaborate response to defendants' post-trial brief. (Amici's brief on the substantive

merits was filed at the time of trial.) Amici do believe, however, that a brief comment on defendants' post-trial brief would be useful, especially with respect to what this case does and does not involve.

The first two parts of the argument in defendants' post-trial brief (pp. 13-55), as well as much of the introductory material in that brief, completely misinterpret plaintiffs' claim that the parental/judicial consent statute is unconstitutional "on its face". The reference to "on its face" simply means that the unconstitutionality of the statute as applied to plaintiffs' class can be determined from the text of the statute alone (as construed by the state court.) It has nothing to do with classic First Amendment facial overbreadth, or First Amendment facial vagueness concepts. Thus, the first

two substantive sections of defendants' brief are irrelevant to the claims in this case.

This case is a class action, not an action in which named plaintiffs seek to invoke the rights of unknown and hypothetical third parties, as would be the situation with a First Amendment facial overbreadth attack. The class was specifically described by this Court as including "the class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent and who do not wish to involve their parents." Baird v. Bellotti, 393 F. Supp. 847, 851 851 (1975).[1] The statute

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1 The quoted words describe the class represented by plaintiff Mary Moe. As to the so-called "immature minor,"

(footnote cont.)

is being challenged as unconstitutional with respect to that class. In this respect, the challenge here is proceedurally identical to the successful class action challenge to spousal or parental consent in Planned Parenthood v. Danforth, 428 U.S. 52, 57, 62 (1976).

(footnote cont.)
this Court held in its 1975 decision that plaintiffs Parents Aid Society and Dr. Zupnick "have standing to attack the statute as applied to all minors, at least insofar as it requires the consent of both parents" [emphasis added], in the light of "the custom to proceed on the consent of only one parent." Id. at 852. Cf. Baird v. Attorney General, Mass. Adv. Sh. (1977) 96, 110.

There are only two substantive issues in this case: whether the statute impermissibly burdens due process rights, and whether it denies unmarried pregnant minors the equal protection of the laws. The paragraphs of plaintiffs' First Amended complaint (¶¶22-23) concerning the overbreadth of a requirement of parental consultation in every case, and concerning the vagueness of the "best interest of the child" standard, should be read merely to state grounds for the conclusion that the statute is impermissibly burdensome under the due process clause. These two paragraphs do not and cannot transfer this case into one involving First Amendment facial overbreadth or facial vagueness issues.

The actual merits of the case -- whether the statute impermissibly burdens due process rights, and

whether it unconstitutionally discriminates -- are discussed in amici's brief at pp. 5-53, and in defendants' post-trial brief at 56-104 (especially 56-96), and we wish to make only one comment. On the matter of whether the requirement to go to court creates an undue burden, defendants rely enormously (see their brief at p. 59) on a remark made by Judge Aldrich at the April 13, 1977 hearing concerning his conclusive assumption of speed, diligence, and proper procedure and consideration by the state court. We do not believe this comment by Judge Aldrich amounts to a ruling that the requirement of commencing court proceedings cannot be burdensome, but rather only that this Court assumes that the state courts will do the best job they can, and will do it in good faith, within the existing state judicial system. It is a manipulation of this remark to

conclude that it bars all efforts by plaintiffs or amici to show that there are inherent institutional burdens to bringing suit in Massachusetts which, even with the best of faith and effort by state court system personnel, create a significant burden for an unmarried pregnant minor.[1]

Yours sincerely,

John H. Henn
Counsel for Planned Parenthood
League of Massachusetts,
et al.,
Amici Curiae

cc: All counsel of record

---

[1] The heading in the chart at p. 27 of amici's brief should read: "counties/months in which there were no sessions or no civil sessions" (the words "no sessions or" were inadvertently omitted).

[Letterhead omitted in printing]

December 27, 1977

John J. Henn, Esquire
Foley, Hoag & Eliot
10 Post Office Square
Boston, Massachusetts 02109

Dear Mr. Henn:

Re: Baird v. Bellotti
No. 74-4992-F

In response to your letter of December 23, I am instructed by the court that no further briefs were to be filed without motion and that I should not circulate your letter. I shall, however, circulate it next

Tuesday, if no objections are received, or, if counsel wish to filed a response, I shall circulate both.

Very truly yours,
s/George F. McGrath
Clerk
U.S. District Court

cc: Joseph J. Balliro, Esquire
Garrick F. Cole, Esquire
Michael B. Meyer, Esquire
Brian A. Riley, Esquire

[Title omitted in printing]

Defendants' Opposition to the
Circulation of Amici's Letter
of December 23, 1977

Defendants oppose the circulation of Amici's letter of December 23, 1977 to the Court, and state as their reasons as follows:

1. The Court, in its oral order of October 18, 1977, ordered that reply briefs would only be filed after a motion for leave to file reply briefs had been granted. Tr., October 18, 1977, at 202.

2. Amici have filed no motion for leave to file reply briefs.

3. Amici's letter of December 23, 1977 is in fact a reply brief in the guise of a letter to the Clerk.

By their Attorneys,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Garrick F. Cole

Thomas R. Kiley

Michael B. Meyer
Assistant Attorneys General
Government Bureau
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(6170 727-1038

December 30, 1977

[Title omitted in printing]

Amici's Motion for Leave to File Responsive Letter to Defendants' Post-Trial Brief

Amici Planned Parenthood League of Massachusetts, et al., move that its letter of December 23, 1977 be deemed to be duly filed as in the nature of a reply memorandum to defendants' post-trial brief.

As grounds for this motion, amici says that it filed its substantive brief at the time of trial in October, 1977, that defendants only filed their substantive brief in December, 1977 and thus had two months to prepare their brief in light of the arguments previously made by amici (and by plaintiffs), and that fairness dictates that amici be permitted a brief comment on defendants' brief.

This is particularly so where amici's letter simply points out that defendant's brief strenuously and extensively argues an issue (first amendment facial overbreadth/vaguness) which amici and plaintiffs do not even raise.

By its attorneys,

_____

John H. Henn
Foley, Hoag and Eliot
10 Post Office Square
Boston, Massachusetts 02109
617-482-1390

[Dated: December 29, 1978]

(Title omitted in printing)

ORDER

[On Motion to Dissolve
Preliminary Injunction]

December 29, 1977

The defendants have moved to dissolve the preliminary injunction entered by this court on February 10, 1977 enjoining them from enforcing Mass. Gen. Laws ch. 112, §12P or, in the alternative, to modify the injunction by enjoining enforcement of the statute only insofar as it applies to mature minors in the first trimester. The court denies the defendants' motion. Judge Julian dissents from this denial.

By Order of the Court,

_____

Chief Deputy Clerk

CAROL COOPERMAN NADELSON

Born:	October 13, 1936, Brooklyn, New York
Married:	Dr. Theodore Nadelson; 2 children
Address:	30 Amory Street, Brookline, Mass. 02146 566-5890
1957	B.A. Magna Cum Laude, Brooklyn College, Brooklyn, N.Y.
1961	M.D. With Honor, University of Rochester School Medicine, Rochester, N.Y.
1959	NIMH Fellowship in Pediatrics, University of Rochester (Summer)
1960	NIMH Fellowship in Psychiatry, University of Rochester (Summer)
1961-62	Intern (Medicine), University of Rochester, Strong Memorial Hospital, New York
1962-64	Resident in Psychiatry, Massachusetts Mental Health Center
1962-65	Teaching Fellow in Psychiatry, Harvard Medical School

1964-74	Boston Psychoanalytic Institute, Candidate
1964-66	Resident in Psychiatry, Beth Israel Hospital, Boston
1965-66	Research Fellow in Psychiatry, Harvard Medical School
1966-70	Assistant in Psychiatry, Beth Israel Hospital, Boston
1966-68	Psychiatric Consultant, Peace Corps.
1967-69	Career Teacher in Psychiatry, Harvard Medical School
1968-70	Special Lecturer, Simmons College, School of Social Work
1969-72	Clinical Instructor in Psychiatry, Harvard Medical School
1969-70	Fellow, Radcliffe Institute
1970-72	Associate in Psychiatry, Beth Israel Hospital
1971	NIMH Fellowship, Sex Research Institute, Indiana University (Summer)
1972-74	Staff Liaison Psychiatrist with Obstetrics-Gynecology Department of Beth Israel Hospital

1972-73	Assistant Psychiatrist, Beth Israel Hospital, Boston
1973-77	Associate Psychiatrist, Beth Israel Hospital, Boston
1973	Assistant Professor of Psychiatry, Harvard Medical School
1973	Assistant in Psychiatry, Childrens Hospital Medical Center, Boston
1973	Consultant, Department of Adolescent Medicine, Childrens Hospital Medical Center
1973	Faculty, Graduate Office Psychiatry for Physicians, Faulkner Hospital
1971,73	Faculty, Postgraduate Course, Office Psychiatry for Physicians, Faulkner Hospital
1973,74	Faculty Postgraduate Course, Pediatrics, Childrens Hospital Medical Center
1973	Faculty, Radcliffe Institute
1974	Director Medical Student Education, Department of Psychiatry, Beth Israel Hospital, Boston

1974	Member, Boston Psychoanalytic Institute and Society, Inc.
1974,75	Faculty Postgraduate course Adolescent Medicine, Children's Hospital Medical Center
1975	Guest Lecturer, Harvard Summer School - Health Sciences
1975	Extension Division Faculty, Boston Psychoanalytic Society and Institute
1975	Counsellor, Office of Student Affairs, Harvard Medical School
1976	Associate Professor of Psychiatry, Harvard Medical School
1977	Psychiatrist, Beth Israel Hospital, Boston

PROFESSIONAL MEMBERSHIPS AND HONORS

1957	Phi Beta Kappa
1961	Alpha Omega Alpha
1961	Benjamin Rush Award in Psychiatry, University of Rochester
1968	Member, American Psychiatric Association and Northern Psychiatric Society

1969	Member, Massachusetts Medical Society
1969	Member, Harvard Medical Area Women's Group
1970	Member, American Medical Women's Association
1971	Member, Association for Academic Psychiatry
1973	Member, Group for the Advancement of Psychiatry (GAP) Committee on the Family
1974	Member, American Psychopathological Association
1974	Fellow, American Psychiatric Association
1976	Nominee, Boylston Society Award for Teaching Excellence in the Basic Sciences, Harvard Medical School
1977	Fellow, American College of Psychiatry
1977	Member, Eastern Association of Sex Therapists

LICENSES:

Massachusetts #27405
California #G12331

PUBLICATIONS:

1. Nadelson, C.: "The Philosophy of Day Care"; Harvard Newsletter, Vol. 3 No. 4, Feb., 1971.
2. Nadelson, C.: "Women in Surgery", Arch. Surg., 102:234, March, 1971.
3. Nadelson, C.: "The Development of a Day Care Center", J.A.M.W.A. 26:7 347-351, 1971
4. Nadelson, C. and Notman, M.,: "The Woman Pysician", J. Med. Educ. 47:176-183, 1972.
5. Nadelson, C.: "Psychological Issues in Therapeutic Abortion", J.A.M.W.A. 27:1, 12-15, 1972
6. Nadelson, C, Bassuk, E.,: "A Dilemma in Medical Education", J. Med. Educ. 47:11, November, 1972.
7. Nadelson, C., and Lowry, P.: "Family Planning Services in Massachusetts, Report of Health Subcommittee, Governor's Commission on the Status of Women, March, 1972.
8. Nadelson, C.": "Normal and Special Aspects of Pregnancy" Obstetrics and Gynecology, 41:4, 611-620, 1973.
9. Lowry, P. and Nadelson, C.: "Should We Repeal the Abortion laws?" Boston Globe, October 29, 1972; "Man and Science in Modern Society" Reprinted (1973).

10. Nadelson, C., Hagen, D.: "Consultation with Non-Psychiatric Physicians". The Psychiatrist as a Teacher, National Conference Proceedings. George Wshington University, Psychiatry Dept., 1973.
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12. Nadelson, C., Nadelson, T.: "Reflex and Reflection--Definition of Psychotherapy in Supervision." In Mogstad TE, Magnussen, F. What is Psychotherapy. Proceedings 9th Internatl. Cong. of Psychotherapy, Karger Basel 1975.
13. Notman, M., Nadelson, C.: "Training Women for Medical Careers", World Journal of Psychosynthesis. 5:6 20-25, 1973.
14. Nadelson, C.: Adjustment, New Approaches to Women's Mental Health. In "The American Woman: Who Will She Be?" Glencoe Press, 1974.
15. Nadelson, C., Notman, M.: "Success or Failure: Women As Medical Students" J.A.M.W.A. 29:4, 167-172, April, 1974.
16. Nadelson, C.: "Abortion Counseling: Focus on Adolescent Pregnancy" Pediatrics, Dec., 1974., Vol. 54, No. 6.

17. Nadelson, C., Notman, M., Aarons, E., Feldman, J.: "The Pregnant Therapist" Am. J. Psych., Vol. 131:10, Oct. 1974. Reprinted in Inventory of Marriage and Family Literature, Vol. 3, 1974.
18. Nadelson, C., Bassuk E., Hopps C., Boutelle, W.,: "Conjoint Marital Psychotherapy: Evaluative Procedures. Social Casework, 56:2, 91-96, Feb. 1975.
19. Nadelson, C., Bassuk, E., Hopps, C., Boutell, W.,: "Conjoint Marital Psychotherapy: Treatment Techniques", Dis. Nerv. Syst. (in press).
20. Nadelson, C., Bassuk, E.; "Pregnancy and Abortion in a Masochistic Character" Psychiatric Opinion, Feb. 1975. 12:2, 37-42.
21. Nadelson, C.: "The Pregnant Teenager: Problems of Choice in a Developmental Framework", Psychiatric Opinion, Feb. 1975, 12:2, 6-12.
22. Nadelson, C. and Nadelson, T.: "Development Determinants of Sexuality", Psychiatric Opinion 12:5, 14-19, May 1975.
23. Nadelson, C.: "Data Base Collection in Obstetrics and Gynecology" in Ryback, R., The Problem Oriented Record in Psychiatry and Mental Health Care. Grune and Stratton Inc., New York, 1974.

24. Nadelson, C.: "Increasing the Number of Women Physicians: Problems and Directions" Case Western Reserve Medical Alumni Bulletin 38:4-6, Nov. 1974.
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30. Nadelson., Notman, M. "Psychiatric Treatment of the Pregnant Teenager and the Putative Father." Current Psychiatric Therapies (in press).
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32. Nadelson, C., Notman, M. "Psychological Responses to Rape." Psychiatric Opinion (in press).
33. Nadelson, C. "Emotional Sequelae to Adoption." American Family Physician, 14:124-127, September, 1976.
34. Nadelson, C., Bassuk, E., Hopps. C., Boutelle, W. "The Use of Videotape in Couples Therapy." Interna. J. Group Psychotherapy, 27:2 241, April, 1977.
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36. Nadelson, C., Notman, M. "Psychotherapy Supervision: The Problem of Conflicting Values." Am. J. Psychotherapy 31:2, 2, 275-283, 1977.
37. Nadelson, C., Notman, M., "Emotional Repercusions of Rape." Medical Aspects of Human Sexuality, 11:3, 16-31, March 1977.
38. Nadelson, C. Rosenfeld, A., Backman, J. Krieger, M. "Incest and Child Abuse" J. Acad. of Child Psychiatry, 16:2, 327-339, Spring, 1977.
39. Nadelson, C., Brogonier, R. "Caring for the Rape Victim, Interact. 1:3 1-12, 1977.

40. Nadelson, C. Notman, M., Bennett, M. "Angst voor Prestatie bij Vrouwen", Tijdschrift voor Psychotherapie, 6:243-252, January, 1977.
41. Nadelson, C., Notman, M. "Conflicts in Identity and Self Esteem for Women", McLean Hospital Journal 2:1, 1977.
42. Nadelson, C., Notman, M. "The Role of the Psychiatrist in Obstetrics-Gynecology Liaison Psychiatry", in Psychiatry in General Medical Practice edited by G. Usdin and J. Lewis. McGraw Hill, New York.
43. Nadelson, C., Notman, M., Hilberman, E. "The Rape Victim", in Modern Legal Medicine and Forensic Science edited by W. Curran and L. McGarry. (in press).
44. Nadelson, C., Notman, M. "Women as Health Care Professionals", Encycl. of Bioethics (in press).
45. Nadelson, C., Notman, M. "Women as Patients", Encycl. of Bioethics (in press).
46. Nadelson, C. "Evaluation of Sexual Dysfunction", In Lazare, A., Outpatient Psychiatry, (in press).
47. Nadelson, C. "Treatment of Sexual Dysfunction" in Lazare, A. Outpatient Psychiatry (in press).

48. Nadelson, C., Notman, M. Poussaint, A. "Early Clinical Exposure in the Teaching of Behavioral Sciences", J. Med. Educ., (in press).
49. Nadelson, C., Notman, M. "Emotional Aspects of the Symptoms, Functions and Disorders of Women", in Psychiatric Medicine edited by G. Usdin, Brunner/Mazel. (in press).

FILM:

The Labor of Love--Pregnancy and Childbirth, 1973.

REFEREE:

New England Journal of Medicine, Psychiatry in Medicine, Medical Economics
American Journal of Psychiatry.

Tapes:

Psychological Aspects of Managing the Teenage Pregnancy. Audio Digest Foundation Pediatrics. Vol. 19, No. 21, November 13, 1973.
The Rape Victim: Psychodynamic Considerations. Audio Cassette Tape Program, American Psych. Assn. 1975.
Psychological Aspects of Pregnancy and the Pregnant Therapist. Behavioral Sciences Tape, January 1975.

BOOK REVIEWS:

Psychosomatic Medicine, Mass. Journal of Psychiatry, American Journal of Psychiatry, Contemporary Psychology, Social Science and Medicine, New England Journal of Medicine, Mental Health, American Journal of Psychotherapy, Journal of the Academy of Psychoanalysis.

Contributor:

Medical Aspects of Human Sexuality, Hospital Tribune, Psychiatric Opinion.

SPECIAL PROFESSIONAL ACTIVITIES:

1970	Medical Student Advisor, Class of 1973, 1974, 1975, 1976.
1970-72	Staff Council Representative, Department of Psychiatry, Beth Israel Hospital.
1970-72	Harvard Medical School Admission Subcommittee II
1971	Speaker's Bureau, American Medical Women's Association
1971-74	Secretary, Northern New England District Branch, APA
1972	American Psychiatric Association Task Force on Women

1972 Consultant on Admission to Medical School, Harvard University, Office of Career Development.

1972 Consultant, Boston University Medical School, Development of a Curriculum for Human Sexuality.

1972-75 Harvard Medical School, Admission Committee Chairman, Subcommittee IV

1972 Harvard Medical School Admissions Committee

1972 Thesis Advisor, Boston University, Department of Psychology; Harvard Graduate School of Education

1973 Northern New England District Branch, APA, Task Force on Sex Education

1973 Student-Faculty Committee Harvard Medical School

1973 Postgraduate Education Committee, Harvard Medical School

1973 Editorial Board, Psychiatric Opinion

1973-75 Secretary, New England Branch, American Medical Women's Association

1974-75 President-elect, Massachusetts Psychiatric Association

1974 Preparatory Commission on Faculty for Conference on

Education of Psychiatrists, American Psychiatric Association

1974,75 Consultant, National Institutes of Mental Health, Psychiatry Education Branch

1974,75 School Consultant, St. Pauls School Concord New Hampshire, Groton School, Groton, Mass. Milton Academy, Milton, Mass.

1974 Mental Health Committee, Mass. Medical Society

1975 Steering Committee, National Institute of Mental Health Grant "The Psychiatrist as a Teacher."

1975 President, Massachusetts Psychiatric Association

1975 Committee on Medical Eduacation, Amer. Psych. Assn.

1975 Workshop Planning Committee, The Psychiatrist as a Teacher IV

1975 Faculty Council, Harvard Medical School

1976 Secretary, Association for Academic Psychiatry

1976 Psychiatry Training Review Committee, National Institute of Mental Health.

1976 Nominating Committee, American Psychiatric Association.

1976 Committee on Institute Analysis, Boston Psychoanal. Inst.

1976 Steering Committee, American Psychiatric Association Educational Development Grant

1976 Nominating Committee, Association for Academic Psychiatry

TEACHING:

1) Harvard Medical School Students - Coordinator and director of psychiatry teaching program, Beth Israel Hospital.

a. I--Behavioral Sciences Seminar
b. II--a) Human Sexuality (Steering Committee, lecturer, group leader, coordinator)
b) Introduction to the Clinic and physical diagnosis - Director and coordinator
c. Principle Clinical Year Clerkship--Supervision and planning of clerkship evaluations and psychotherapy.
Electives--Clinical Aspects of Sexual Dysfunction, Clinical Supervision, Seminar on Adolescence; supervision and planning of electives.

2) Beth Israel Hospital

A. Residency Training Program in Psychiatry

1. Supervision and development of training program in Psychotherapy of couples
2. Elective Seminar, Couples Therapy
3. Didactic Seminar, First year residents and psychology interns--Psychosis
4. Staff Conferences--Family and Couples Therapy
5. Supervision of long and Short term psychotherapy, Couples and family therapy
6. Adolescent Case Conference--Child Psychiatry

B. Obstetrics and Gynecology Liaison

1. Supervision of consultation and teaching residents and psychology trainees
2. Conference on psychiatric aspects of Obs-Gyn, including human sexuality
3. Development, teaching and administration of program for therapeutic abortion and other consultations for Obs-Gyn

4. Development of guidelines of psychiatric and social service consultation for Obs-Gyn Department
5. Development of Sexual Dysfunction Consultation Liaison and clinic

C. Medical Liaison--1965-70

1. Group-ward personnel, dietary interns
2. Supervision of Psychiatric residents on medical liaison
3. Ward rounds and teaching

3) Undergraduate teaching

a. Harvard College/Radcliffe College
Social Relations--"Youth", 1967
Social Relations--"Medical Sociology" 1968
Junior Tutorial--"Pregnancy and Abortion", 1973
Human Sexuality, 1975
Psychological and Social Aspects of Medicine, 1972, 73, 74. --Discussion of "abortion", and "rape."

4) Graduate School Teaching

a. Simmons College Graduate School 1968-70 Human Growth and Development
b Boston University thesis advisor 1972 and 1974
c. Harvard School of Education, 1973, thesis advisor
d. Health Sciences

5) Radcliffe Institute

a. Psychological Development and Clinical Issues of Women,
1973-74
1974-75
1975-76
1976-77

6) Psychiatry Department Committees on Curriculum

a. Committee on Clinical Teaching, 1975-
b. Committee on Introduction to Clinical Medicine, 1976-

7) Interdepartmental Committees on Curriculum - Primary Care Elective Committee, 1976

8) Preterm, Inc.

a. Course - Counselling Adolescents, 1976

9) Other Medical School and Hospital and Hospital and Agency Teaching

a. Special Lectures at Boston University, Tufts Medical Schools, University of Vermont, Case Western Reserve, University of Colorado, State University of New York, Downstate.
b. Lectures and Rounds at Massachusetts Mental Health Center and Boston State Hospital, Framingham Mental Health Association, Boston Veteran's Administration Hospital, Massachusetts General Hospital, Peter Bent Brigham Hospital, Boston Family Service.
c. Seminar Series on Couples Therapy to the Family Service Agencies of Greater Boston.
d. Guest Lectures for Community Sex Information, Planned Parenthood.
e. Seminar series -Adolescent psychology, Children's Hospital Medical Center, Adolescent Medicine Unit.

f. Guest speaker - Michigan Psychiatric and Psychoanalytic Society, Washington, D.C. Psychiatric Society.

RESEARCH IN PROGRESS:

1. Attitudes of male and female patients toward male and female physicians.
2. Sexual attitudes and information of pregnant adolescent girls compared with non-pregnant adolescents; development of psychologically-oriented programs of communicating with adolescents in groups and individually about sexuality.
3. Assessment of success criteria in the psychiatric treatment of married and non-married couples.
4. Development of comprehensive care program for pregnant adolescents in conjunction with Children's Hospital Medical Center.
5. Development of a Program for the Treatment of Problems in Sexual Functioning.
6. Study of the stress areas during medical school, especially for women students.
7. Development of a Program of Crisis Intervention for Rape Victims.

8. Study of adolescent developmental conflicts in achievement, and cognitive growth in high school.

PRESENTATIONS:

1970 "Abortion", Unitarian Universalist Women's Federation Symposium
1971 "Therapeutic Abortion", Massachusetts Organization for the repeal of Abortion Laws
1971 "Day Care", MIT
1972 "Problems of Professional Women", Women Architects Group
1971 "The Family and Changes in Women's Roles", New England Council of Reform Synagogues
1971 "The Woman in Medicine", Harvard Medical Area Women's Group
1972 "The Changing Role of Women", Massachusetts Mental Health Center
1972 "Therapeutic Abortion", its implications to Society and Nursing Assoc.
1972 "Alternatives in Child Rearing"; Child Psychiatry Department, Tufts University Medical School

1972 "Psychological Issues in Abortion"; Massachusetts Mental Health
1972 "Day Care"; Children's Hospital Medical Center
1972 "Psychological Aspects of Abortion"; Planned Parenthood of Massachusetts
1972 "Adolescent Pregnancy" 1) Mary Eliza Mahoney Family Life Center; 2) Family Health Unit--Children's Hospital Medical Center
1972 "Clinical Management of Sexual Dysfunction Problems": 1) Chelsea Naval Hospital; 2) McLean Hospital
1972 "Sex Roles in Mothers and Children", Children's Hospital Medical Center
1972 "Medicine, A Career Conflict for Women", American Psychiatric Association Convention, May, 1972.
1972 "Women in Medicine", New England Women's Medical Association
1972 "New Dimensions for Maternity Homes--Abortion" Florence Crittendon Association of America
1973 "Abortion, Changing Picture", Boston Veteran's Administration Hospital

1973 "Adolescence, Psychological Aspects", Children's Hospital Medical Center

1973 "Are Women's Roles Changing?" McLean Hospital

1973 "Adjustment, New Approaches to Women's Mental Health" University of Georgia

1973 "Success or Failure, Women as Medical Students", American Psychological Assoc.

1973 "Family Dynamics", Children's Hospital Medical Center

1973 "Teen Age Pregnancy", American Psychiatric Association, Honolulu, Hawaii, May, 1973, Annual Meeting

1973 "Conjoint Couples Therapy--Evaluative Techniques", "Reflex and Reflection--Definition of Psychotherapy in Supervision", International Congress on Psychotherapy. Oslo, Norway, June, 1973

1973 "Success or Failure: Women as Medical School Applicants" American Psychological Association, Montreal, Canada, August, 1973

1973 "The Management of Pregnancy" Children's Hospital Medical Center, Postgraduate Pediatrics course

1974 "Research Problems - Pregnancy and Abortion", University of Illinois, Medical School, Institute for Juvenile Research

1974 "Innovative Methods of Treating Sexual Dysfunction", Planned Parenthood and American Association of Sex Education and Counsellors, January, 1974

1974 "Biological and Psychological Aspects of Sexual Differences", McLean Hospital Academic Conference

1974 "The Choice of Sex of Therapist", American Orthopsych. Assoc., San Francisco, California, April, 1974

1974 "The Pregnant Therapist", San Francisco, California (American Orthopsych. Assoc.)

1974 "Community Day Care", American Psychiatric Association, May, 1974

1974 "New Dimensions in Psychotherapy Supervision", American Psych. Assoc., May, 1974

1974 "Sexual Trauma in Children", Postgraduate Course in Adolescent Medicine Children's Hospital Medical Center, May.

1974 "Rape Crisis Intervention", Massachusetts Mental Health Center, 1974

1974 "Adolescent Development", Childrens Hospital Medical Center Postgraduate Pediatrics course

1974,5 "Sexual Dysfunction" Mass. General Hospital

1974 "Couples therapy" Medfield State Hospital

1974 "Problems in Adolescent Sexuality", Boston State Hospital

1973 "Couples Therapy" Medfield State Hospital

1974 "Psychology of Pregnancy, "Psychosocial Consideration-Medical Care Delivery", "Psychological Issues - Women in Psychiatry" Case Western Reserve University

1974 Clinical Considerations Related to Sex Stereotyping and Mental Health Interdisciplinary Colloquium - Boston University School of Social Work, Tufts New England Medical Center Department of Psychiatry, McLean Hospital

1974 "Rape Crisis Intervention" School of Public Health, University of North Carolina, Chapel Hill North Carolina

1974 "Treatment of Sexual Dysfunction, New England Medical Center Dept. of Psych., Tufts University

1975 "Treatment of Sexual Dysfunction" Peter Bent Brigham Hospital, Grand Rounds

1975 "Rape" Boston Veteran's Hospital, Outpatient Clinic

1975 "Women in Therapy" Massachusetts Mental Health Center

1975 "Abortion, A Focus on Teenage Pregnancy", "Teenage Sexuality", Postgraduate Obstetric-Pediatric Seminar, Ft. Lauderdale, Florida, August 1975.

1975 "Issues in Mental Health" Harvard Office of Career Development

1975 "The Best Interests of the Child: The Legal and Psychiatric Interface of Child placement and Custody" - Child Psychiatry Service, New England Medical Center Hospital and Tufts University School of Medicine

1975 "The Rape Victim" Boston College School of Nursing

1975 "Treatment of Sexual Dysfunction" Academic Rounds, Dept. of Psychiatry, Boston University, School of Medicine

1975 "Teenage Sexuality" Mass. Mental Health Center

1975 "The Rape Victim: Psychodynamic Considerations" with M. Notman, M.D., Am. Psychiatric Assoc., Anaheim Calif. 1975

1975 "Women in Academic Psychiatry" Am. Psychiatric Assoc., Anaheim Calif., May 1975

1975 "Psychodynamic and Cognitive Aspects of Adolescence" with M. Notman, M.D., M. Bennett, M.D., J. Stein, Ed.D., Am. Psych. Assoc., Anaheim Calif., May 1975

1975 "Clinical Considerations: The Successful Woman" Boston University School of Social Work

1975 "Dilemnas of Suburban Living: Family Stresses" Centennial Symposium, Wellesley College, May 1975

1975 "Self Image of Women Health Care Professionals", with M. Notman, M.D. Joint Committee on the Status of Women, Harvard Medical School, School of Dental Medicine and School of Public Health.

1975 "Pregnancy and Motherhood" Primary Care Training Program, Boston City Hospital

1975 "Sexual Dysfunction" Norfolk Mental Health Center

1976,77 "Human Sexuality" McLean Hospital, Board Review Course

1976 "Women and Psychotherapy" Departmemt of Psychiatry, Tufts University Medical School

1976 "Psychodynamic Issues in Rape" Department of Psychiatry, University of Colorado Medical School; Boston V.A. Hospital; Departments of Medicine and Psychiatry, Cambridge Hospital

1976 "Human Sexuality" Brookline Mental Health Assn.

1976 "Changing Role of Women in Mental Health" Children's Hospital Medical Center

1976 "Sexuality and Aging" Boston University Medical Center

1976,77 "Psychological Development of Adolescents" Rape in Children and Adolescents" Postgraduate Course in Adolescent Medicine, Harvard Medical School and Children's Hospital Medical Center

1976 "Women in Management" John F. Kennedy School of Government - Harvard University

1976 "Marital Therapy" Family Counseling Service, Inc.

1976 "Teenage Sexuality: Motivational Aspects in Contraception and Abortion: Postgraduate Course in Human Sexuality, Harvard Medical School and Beth Israel Hospital

1976 "Has Feminism Charged Psychoanalysis?" Amer. Academy of Psychoanal., Miami Beach, May, 1976

1976 "Women in Medicine and Psychiatry" Dept. Health, Education and Welfare, Boston

1976 "Women and Achievement", Association of Junior Leagues, Inc.

1976 "Sexuality" Harvard School of Public Health

1976 "Women and Achievement", Harvard School of Public Health

1976 "Therapy of Sexual Dysfunction" Northeastern Society for Group Psychotherapy

1976 "The Sexually Abused Child" Amer. Acad. of Pediatrics, Mass. Chapter

1976 "Early Clinical Experience in Behavioral Science Teaching"
"Conflicts in Identity and Self Esteem for Women"
"Sexual Activity with the

Psychiatrist: Ethical Problems in a District Branch Dilemma" Presented: Annual Meeting, Amer. Psych. Assn., Miami Beach, May, 1976.

1976 "Achievement Conflict in Women: Psychotherapeutic Considerations" Presented at the International Conference for Medical Psychotherapy, Paris, France, July, 1976

1976 "Sexual Dysfunction", Framingham Mental Health Association and Grand Rounds, Framingham Union Hospital, Framingham, MA

1976 Visting Professor, University of Vermont Medical School, Department of Psychiatry, "Incest", Burlington, Vermont.

1976 "Sexual Dysfunction" American Association of Family Practice, Boston, MA

1976 "Sexual Dysfunction", McLean Hospital

1976 "Problems of Women Physicians" American Association of Medical Colleges

1977 "Treatment of Sexual Dysfunction", Boston University Health Services, Boston, MA

1977 "Adolescent Development", Moses Brown School, Providence, RI

1977 "The Role of the Psychiatrist in Obstetric-Gynecology Liaison", American College of Psychiatry, Atlanta, GA

1977 "The Use of Groups in Teaching Adolescents", N.E. Society of Group Psychotherapy.

1977 "Sexual Dysfunction", Human Resources Institute, Boston, MA

1977 "Management of the Pregnant Adolescent", Department of Pediatrics, New England Medical Center, Boston, MA

1977 "Pregnancy as a Developmental Phase", Family Practice Program, Boston City Hospital.

1977 "Sexual Dysfunction", Primary Care Seminar, Harvard School of Public Health.

1977 "Achievement Conflict in Women", Michigan Psychiatric Society, Ann. Arbor.

1977 "The Development of Aggresssion in the Female", Michigan Psychiatric Society, Ann Arbor; Michigan Psychoanalytic Society, Ann Arbor.

1977 "Considerations of Female Aggression", Washington Psychiatric Association, Washington, D.C.

1977 "Women in Health Care", Harvard School of Public Health.

1976,77 Course - "Teaching the Psychiatric Resident to be a Psychiatric Educator." American Psychiatric Association Meetings, Toronto.

1977 "Achievement Conflict in Women - Therapeutic Considerations." American Psychiatric Association, Toronto, Ontario, Canada.

1977 "Socialization as Part of the Treatment Process." American Psychiatric Association, Toronto.

1977 "Women as Gynecological Patients: Changing Considerations of Reproduction", American Psychiatric Association, Toronto.

1977 "Education for the Sex Educator", Boston University, Department of Continuing Education, Boston.

1977 "Should a Woman be More Like a Man?" Bowdoin College, Brunswich, Maine.

1977 "Psychoanalytic Approach to Marital Therapy", Butler Hospital Annual Spring Symposium, Providence, Rhode Island.

COMMUNITY ACTIVITIES

1969-71 Board of Directors, Pregnancy Counselling Service
1970 Subcommittee on Day Care, Harvard Area Planning Commission
1970-71 President, The Children's Center, Inc.
1971 Steering Committee for Day Care, Harvard University
1971 Chairman, Nominating Committee, Pregnancy Counselling Service
1971-74 Governor's Commission on the Status of Women: Chairman Health Task Force
1971-74 Vice President, Pregnancy Counselling Service
1971-73 Board of Directors, The Children's Center, Inc.
1971 Planned Parenthood and Planned Parenthood Physicians--Speaker's Bureau
1971 League of Women Voters--Speaker's Bureau
1972 Editorial Advisor, "Women's Yellow Pages"

1972-74 Medical Advisory Committee, Pregnancy Counselling Service
1972-73 Advisory Board, Society of Health and Human values of the Board of Christian Education
1972-74 Policy and Planning Committee, Pregnancy Counselling Service
1973 Advisory Board--Children's Center, Inc.
1974 Advisory Board Day Care Planning Harvard Medical area
1974 Advisory Board Governors Commission on the Status of Women
1975 Advisory Board, Schlesinger Library, Radcliffe College
1975 Consultant, Preterm, Inc.
1974 to present Who's Who of American Women
1974,5,6 Who's Who in the United States
1974,5,6 Dictionary of International Biography

[Letterhead omitted in printing]

September 1, 1976

CURRICULUM VITAE

Sprague W. Hazard

Birth:

Newport, Rhode Island - December 13, 1915

Education:

University of Rhode Island - B.S. 1937

Columbia University - M.D. 1941

Training:

Newark City Hospital, Newark, N.J.
Rotating Internship - 10/15/41 to 10/15/42

Charles V. Chapin Hospital, Providence, R.I.
Communicable Diseases - 1/1/46 to 6/30/46

Children's Hospital, Boston, Mass.
Pediatric Pathology and Medicine - 7/1/46 to 12/31/48

Military:

Medical Corps, U.S. Navy - 10/15/42 to 3/23/46
Discharged as Lt. Cmdr. - U.S.N.R.

Professional Societies and Appointments:

Massachusetts Medical Society
American Board of Pediatrics - 1950
American Academy of Pediatrics
New England Pediatric Society
Society for Adolescent Medicine
American College Health Association - 1965-75

New England College Health
Association - President
1971-72
Clinical Instructor in Pediatrics,
Harvard Medical School
Senior Associate Physician,
Children's Hospital Medical
Ctr.
President Medical Staff,
Children's Hospital Medical
Ctr. - 1970-72.

Practice:
Private Practice - Pediatrics,
Needham, Mass. - 1/1/49 until
7/1/65

Previous Occupation:
Director, University Health
Services - 1965-75
Brandeis University, Waltham, Mass.

Present Occupation:
Director of Health Service and
School Physician
Bement School
Deerfield Academy
Eaglebrook School
Stoneleigh-Burnham School

Community and Professional Activities:
American Academy of Pediatrics -
Massachusetts Chapter
Chairman, Committee on Mental
Health, 1959-65
Chapter Chairman, 1966-70
Chapter Executive Committee,
1970 -
Consultant, Operation Head
Start, 1965-75

District Organization
Alternate District Chairman,
1970-74
District Chairman, 1974 -

National Organization
Committee on Youth, 1965-74 -
Chairman, 1970-74
Council on Child Health, 1970 -
Section on Child Development,
1964
Ad Hoc Committee on Continuing
Education in Psycho-social
Pediatrics, 1966-69
Member of Executive Board, 1974-

Massachusetts Medical Society
Committee on Mental Health,
1968-72
Committee on Student Health,
1973 -

Associations for Mental Health
Massachusetts
First Vice-President, 1959-65
Professional Advisory Committee,
1962-65
Board of Directors, 1965-74

National
Professional Advisory Council,
1966-72
Panel of Professional
Consultants, 1972 -

United Community Services
Health Council, 1965-69
Board of Directors, 1969-73
Health Technical Advisory
Committee, 1969-74
Chairman, Mental Health
Planning Committee of
Metropolitan Boston, 1965-68

Easter Seal Society
Professional Advisory
Committee, 1971-73;
Chairman, 1973-75
House of Delegates, 1971-75
Committee to Assist in the
Education of the Handicapped,
1972-74

Professional Advisory Council,
National PTA Project on Children's
Emotional Health, 1968-70

Massachusetts Fund for Children
and Youth (an affiliate of the
Massachusetts Committee on
Children and Youth), 1974-

Home:

Deerfield, Mass., 01342 -
413/772-0698

Wife - Nancy Ann Hazard

Children - Sprague William
Robert Warren
Duncan Rowland
Sharon Lee
Brian Carter
Mara Lynn

Office:

Deerfield Academy 413/772-0241
Deerfield, Mass. 03142

[Excerpted from 51 Pediatrics at 293]

AMERICAN ACADEMY OF PEDIATRICS
COMMITTEE ON YOUTH

A MODEL ACT PROVIDING FOR CONSENT OF MINORS FOR HEALTH SERVICES

PREFATORY NOTE*

[The following text was italicized in its original form]

This Model Act is drafted with the purpose of stimulating all states of

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* This Model Act has been approved by the Council on Child Health of the Academy. It is recommended for enactment in all the states.

The statements presented herein do not preclude alternatives which may be more appropriate, taking into account local situations and all other relevant facts.

the union to review their statutes in regard to minors' consent for health services. It intends to be all inclusive to give the individual state the option to adopt part or all of this Act whenever it sees fit.

In a democratic nation such as ours, individuals' rights are paramount. In order for everyone, including minors, to have the right of obtaining health services, the balance of this right against others becomes of the utmost importance. This Model Act accepts the concept that getting health services is a basic right. Also, it accepts that parents have their basic right of protecting and promoting the health and welfare of their minors. Therefore, this Act is a compromise and a balance of these two basic rights in the conditions specified. The goal of this Act is to insure that all minors can have quality health services by granting

the minors self-consent in conditions and instances that will prevent them from seeking services if parental consent is required and by encouraging health professionals to deliver quality services to minors without incurring legal liability. Reasonable safeguards and limitations are stipulated in this Act to protect the minors' safety and the right of the parent. This Act also emphasizes the promotion of family harmony and minor's maturity. [End of italicized text.]

WHEREAS, certain minors are not obtaining adequate medical, dental, or other health care due to current legal and medical obstacles.

Whereas, providers of medical, dental, and other health care are now vulnerable to legal action for giving care to minors,

Whereas, there is a need for coordination, stimulation, and support of access to medical, dental, and other health care for certain minors in need of such care without violating the rights of parents to protect and promote their minors' health,

Be It Enacted by the Legislature of the State of ------, as follows:

Section 1. For the purposes of this act:

(1) "Minor" means any person under the age of majority as defined by the State statute or under 18 years of age, whichever is lower;

(2) "Health Professional" means state licensed physician, psychologist, dentist, osteopathic physician, nurse, and other licensed health practitioner;

(3) "Health Services" means health services specified by the state, appropriately delivered by

different health professionals including examination, preventive and curative treatment, operation, hospitalization (admission or discharge), giving or receiving blood and blood derivatives, receiving organ transplantation, pledging donation of organs after death, the use of anesthetics, and receiving contraceptive advice and devices;

(4) The masculine shall include the feminine.

Section 2. Any person who reaches the age of majority or 18 years of age or is on active duty with or has served in any branch of the Armed Forces of the United States shall be considered an adult in so far as the consent for health services is concerned.

Section 3. Notwithstanding any other provision of law, the following minors may give consent to health professionals for health services:

(1) Any minor who is or was ever married, or has had a child, or graduated from high school, or is emancipated; or

(2) Any minor who has been separated from his parent, parents, or legal guardian for whatever reason and is supporting himself by whatever means; or

(3) Any minor who professes or is found to be pregnant, or afflicted with any reportable communicable disease including venereal disease, or drug and substance abuse including alcohol and nicotine. This self-consent only applies to the prevention, diagnosis, and treatment of those conditions specified in this subsection. The self-consent in the case of pregnancy, venereal disease, and drug and substance abuse also obliges the health professional, if he accepts the responsibility as the

provider of the health service, to counsel the minor by himself or by referral to another health professional for counselling.

The health professional may, but shall not be obliged to inform the parent, parents, or legal guardian of the minor of any treatment given or needed when:

(a) in the judgment of the health professional severe complications are present or anticipated; or

(b) major surgery or prolonged hospitalization is needed; or

(c) failure to inform the parent, parents, or legal guardian would seriously jeopardize the safety and health of the minor patient, younger siblings, or the public; or

(d) to inform them would benefit the minor's physical and mental health and family harmony.

Such information shall be given to the minor's parent, parents, or legal guardian only when the minor consents or when because of the minor's age or condition the attending health professional can reasonably presume such consent.

Notification or disclosure to the spouse, parent, parents, or legal guardian by the health professional shall not constitute libel or slander, a violation of the right of privacy, a violation of the rule of priviliged communication or any other legal basis of liability. When the minor is found not to be pregnant, or not afflicted with venereal disease, or not suffering from a drug or substance abuse, including alcohol and nicotine, then no information with respect to any appointment, examination, test, or other health procedure shall be given to the parent, parents, or legal

guardian, if they have not been already informed as permitted in this Act, without the consent of the minor.

(4) Any minor who has physical or emotional problems and is capable of making rational decisions, and whose relationship with his parents or legal guardian is in such a state that by informing them the minor will fail to seek initial or future help. After the professional establishes his rapport with the minor, then he may inform the parent, parents, or legal guardian unless such action will jeopardize the life of the patient or the favorable result of the treatment; or

(5) Any minor who needs emergency care, including transfusions, without which his health will be jeopardized. The parent, parents, or legal guardian shall be informed as soon as practical except in conditions mentioned in subsections 1, 2, 3, or 4 of this section; or

(6) Any minor who has had a child may give effective consent to health service for his child; or

(7) Any minor may give consent for health care for his spouse if his spouse is unable to give consent by reason of physical or mental incapacity.

Section 4. No consent of anyone else including parent, parents, custodian, legal guardian, or any court shall be required for any person mentioned in Section 3 except where specified. Consent of the minor shall not be subject to later disaffirmance or revocation because of minority. The spouse, parent, parents, or legal guardian shall not be liable for payment for such service unless the spouse, parent, parents, or legal guardian have expressly agreed to pay for such care. The minor so consenting for such health services

shall thereby assume financial responsibility for the cost of said services except those who are proven unable to pay and who receive the services in public institutions.

Section 5. If major surgery, general anesthesia, or a life-threatening procedure has to be undertaken on a minor with his consent, it shall be necessary for the physician to obtain approval from another physician for the management except in an emergency in a community where it is impossible for the surgeon to contact any other physician within a reasonable time for the purpose of concurrence.

Section 6. Self-consent of minors shall not apply to sterilization or abortion.

Section 7. No consent shall be required of any minor who does not possess the mental capacity or who has a physical disability which renders

him incapable of giving his consent and who has no known relatives or legal guardians if two physicians agree on the health service to be given.

Section 8. Except by specific legal requirement, no information in regard to venereal disease, drug and substance abuse, pregnancy, and emotional illness shall be given by the health professional to another professional, school, law enforcement official, court authority, government agent, spouse, future spouse, employer, or any other person without the consent of the minor, unless giving the information is necessary to the health of the minor and the public and only when the minor's identity is kept confidential.

Section 9. The consent of the minor who represents that he may give effective consent under this Act for the purpose of receiving health

services but who may not in fact do so, shall be deemed effective for the purposes of prevention, diagnosis, and treatment required without the consent of the minor's parent, parents, or legal guardian if the person rendering the service relied in good faith upon the representation of the minor.

Section 10. Any health professional may render or attempt to render emergency service or first aid, medical, surgical, dental, or psychiatric treatment without compensation to any injured person or any person regardless of age who is in need of immediate health care when in good faith, the professional believes that the giving of aid is the only alternative to probable death or serious physical or mental damage. For major surgery or any dangerous procedures concurrence of another physician shall, if practical, be obtained.

Section 11. Any health professional may render nonemergency services to minors for conditions which will endanger the health or life of the minor if services would be delayed by obtaining consent from spouse, parent, parents, or legal guardian.

Section 12. Any minor who is examined, treated, hospitalized, or receives health services under this Act may give legal consent, and no person who administers such health services shall be liable civilly or criminally for assault, battery, or assult and battery, or any other legal charge, except for negligence or intentional harm, for treating such minor without advising his parent, parents, or legal guardian.

Section 13. In the event of emergency, either parent or legal guardian may authorize by writing or by telephonic communication with a

witness any adult to give consent for a minor who himself is unable to give self-consent for health care for whatever reason.

Section 14. Nothing in this Act shall require any health professional to provide service, nor shall any health professional be liable for such refusal.

Section 15. The Governor shall appoint an Advisory Committee that shall have the responsibility of promoting and encouraging the availability of health services for minors; shall conduct and develop resources of payment, private or public, for the rendering of such services; and shall recommend regulations to carry out the conditions and purposes of this Act.

Section 16. In the event any section, sentence, clause, or provision of this Act shall be declared invalid by any court of

competent jurisdiction, such action shall not affect the validity of the remaining sections, sentences, clauses, or provisions of this Act which shall continue effective.

Section 17. This Act shall become effective immediately upon passage and approval of the Governor.

COMMITTEE ON YOUTH

SPRAGUE W. HAZARD, M.D., Chairman
V. ROBERT ALLEN, M.D.
VICTOR EISNER, M.D.
DALE C. GARELL, M.D.
S. L. HAMMAR, M.D.
THOMAS E. SHAFFER, M.D.
JEROME T. Y. SHEN, M.D., Editor
NATALIA M. TANNER, M.D.
JOHN ALLEN WELTY, M.D.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL,

DEFENDANT-INTERVENOR.

Before ALDRICH, *Senior Circuit Judge,*
JULIAN, *Senior District Judge*
and FREEDMAN, *District Judge.*

OPINION

April 28, 1975

ALDRICH, *Senior Circuit Judge.* This is an action, brought as a class action, to enjoin, as unconstitutional on its face, the enforcement of a Massachusetts statute, Mass. G.L. c. 112, § 12P, enacted to take effect November 1, 1974, by Mass. Acts 1974, c. 706. The statute makes it a criminal offense to perform an abortion upon a minor without the consent of both parents as well as that of the minor, with certain exceptions, the most important being that the

parents' refusal may be overruled by a superior court judge "for good cause shown." The pertinent paragraph reads as follows:

> "Section 12P(1). If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother."

Standing.

Plaintiffs are William Baird; Mary Moe I, hereinafter Mary Moe;[1] Parents Aid Society, Inc., hereinafter Parents Aid, and Gerald Zupnick. Defendants are Francis Bellotti, Attorney General of the Commonwealth;[2] Garrett Byrne, district attorney for the County of Suffolk, and the district attorneys of all other counties in Massachusetts. Intervening defendants are Kathleen Roth *et al.*, whom we permitted to intervene on behalf of, and as representative of, Massachusetts parents having unmarried minor daughters who are, or who might become,[3] pregnant. No evidence or stipulation was introduced as to any intervenors except Jane Hunerwadel. To be consistent, n. 1, ante, we must dismiss as to all the others. Mrs. Hunerwadel has three minor daughters, one in her teens, none pregnant as far as she knows. Like defendants, she does not know the identity of Mary Moe, and represents her only in the

[1] Three other Mary Moes were named, but no evidence supporting their standing was introduced, and we dismiss as to them for want of proof.

[2] Replacing Robert Quinn, the incumbent at the time this action was brought.

[3] Plaintiffs object to the latter's standing, citing Mr. and Mrs. Doe in *Roe* v. *Wade*, 1973, 410 U.S. 113, 128. We think the situation distinguishable.

general sense that she may represent parents of all nubile minor females in Massachusetts who may, in their opinion unwisely or improperly, wish to have an abortion without informing them.

Plaintiff Mary Moe is an unmarried minor residing at home with her parents in Massachusetts. At the time of the institution of the action she was 16 years of age and about 8 weeks pregnant.[4] She has not informed her parents of her condition, and does not wish to. Her father had told her, in connection with the pregnancy of a contemporary friend, that if that happened to her he would evict her and kill her boy friend. She did not know how far to believe this, except that she felt certain he would take some physical action against the boy. The boy, also 16, was a three-months acquaintance with whom she is no longer associating. Her relations with and affection for her family are "average good." There was no sexual instruction, no one caring to initiate the subject. There is no religious factor. She knew vaguely about contraception, but had no access to materials, and "didn't care to wait until [she] was 18." Her reasons for not informing her parents were in part apprehension of what might happen to her as a result of their learning she had had intercourse, in part the fear of what would happen to her boy friend, and in part the desire to spare her parents' feelings. She did confide in her older sister. Pregnancy would not have kept her from attending school.[5]

[4] Mary Moe has since had an abortion, performed by Dr. Zupnick following a restraining order issued in this case suspending the operation of the statute. It is not suggested that this moots the action as to her. *Roe* v. *Wade*, ante, 410 U.S. at 125.

[5] Defendants contend that the court should have appointed a guardian ad litem for Mary Moe, citing F.R.Civ.P. (17c). We do not do so. *Fatima Foe* v. *Vanderhoof*, D.Colo., 2/5/75, ___ F.Supp. ___. In connection therewith we make the following findings. Mary Moe is of ample intelligence to, and in fact does, fully understand the nature of this action and has voluntarily participated therein. Her

In connection with Mary Moe's capacity to represent a plaintiff class, F.R.Civ.P. 23(a)(4), we find, following examination and cross-examination in camera, that she is of average intelligence and awareness; that her emotional age at least corresponds with her chronical age, and that she had made a considered decision, before she learned of her pregnancy, that in case of pregnancy she would seek to abort, and that she was competent to make and effectuate that decision. If relevant, she did not learn of the other plaintiffs until someone else had determined that she was pregnant. We find that she is fairly representative of a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents. This, of course, requires standing, but there can be no question of Mary Moe's standing to bring this action. Though the statute does not in terms subject her to criminal liability, its enforcement[6] would prevent her, absent violation by someone, from obtaining an abortion without compliance with its terms. Thus, she exhibits "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues," *Baker* v. *Carr,* 1962, 369 U.S. 186, 204,

interests in the facial interpretation of and effect of the statute are fully represented by her competent counsel, and to the extent that there may be thought to be any conflicting interests. by the action of competent counsel for the intervening parent. Finally, we observe, although we do not make it a basis for our decision, that insofar as we look to state law, *cf. Marshall* v. *Mulrenin*, 1 Cir., 1974, 508 F.2d 39, the statute in question, which offers the minor a superior court hearing if her parents refuse their consent to an abortion, provides that the court need not appoint a guardian although in such instance no one at all may be representing her.

[6] Suit was brought shortly before the effective date of the statute and a restraining order was promptly issued. This order has since been continued without a separate hearing for a preliminary injunction with at least the tacit consent of the defendants, first because of their need for depositions, and thereafter because of scheduling difficulties with respect to their witnesses.

thereby demonstrating "a logical nexus . . . between the status asserted by the litigant and the claim [she] presents ...." *Flast* v. *Cohen,* 392 U.S. 83, 102. *See Roe* v. *Wade,* ante, 410 U.S. at 124, *Abele* v. *Markle,* 2 Cir., 1971, 452 F.2d 1121, 1125.[7]

Plaintiff William Baird is the founder and director of plaintiff Parents Aid. He describes himself as being, among other things, a pioneer and advocate for the free availability of abortions. He has a strong personal interest in that sense, but no financial or other tangible concern. *But cf. Sierra Club* v. *Morton,* 1972, 405 U.S. 727, 738; *Data Processing Service* v. *Camp,* 1970, 397 U.S. 150, 154. Baird claims standing because he wishes to assist Parents Aid, which allegedly, if the statute were in force, would make him an accessory. *See Griswold* v. *Connecticut,* 1965, 381 U.S. 479, 481. Arguably, this is too remote an interest to confer standing. If any citizen who might like to violate a law may contest it, the doctrine of standing would be meaningless. *Cf. Roe* v. *Wade,* ante, 410 U.S. at 128, and cases cited. On the other hand, Baird's contemplated activities are far less speculative than those there found insufficient. As director of Parents Aid, Baird for some time provided minors with abortion counseling and services, and the mere continuation of this activity, the mere preservation of the status quo, would subject him to criminal liability. *Cf. Griswold,* ante, 381 U.S. at 481; *Abele,* ante, 452 F.2d at 1125. In the light of the unassailable standing of other plaintiffs, however, *see* post, we do not pass on the question of Baird's standing.

[7] We do not agree with defendants' insistence that in order to have standing Mary Moe must first exhaust the statutory conditions. *Cf. McNeese* v. *Board of Education,* 1963, 373 U.S. 668, 670-72. By this, apparently, they mean that she should have first informed her parents to seek their consent (and had it refused), one of the very requirements she contests. One does not have to comply with a statute in order to challenge its constitutionality.

Plaintiff Parents Aid is organized as a Massachusetts non-profit corporation. It provides, through its medical director and supporting personnel, abortions for varying fees, depending upon ability to pay. About 15% it performs without charge. The Society's standing is conferred not only by its direct subjection to criminal liability, but also by the recognition that even general enforcement of the statute against physicians alone would seriously interfere with its ongoing activities. *Doe* v. *Bolton*, 1973, 410 U.S. 179, 188; *Truax* v. *Raich*, 1915, 239 U.S. 33, 38-39.

Plaintiff Gerald Zupnick, a resident of New York, is a physician licensed in Massachusetts, and is Parents Aid's medical director. He works regularly at the latter's place of business two days a week, performing abortions on a fee basis. Dr. Zupnick's standing in this action is beyond question. The statute at issue applies directly to his activities, and although Dr. Zupnick was receiving a substantial income from performing these procedures, we credit his testimony that the threat of prosecution would force him to cease.

We find that Mary Moe, Parents Aid Society, Inc., and Gerald Zupnick have standing, as representative party plaintiffs, and Jane Hunerwadel as intervenor. From the standpoint of their being due and adequate class representatives, we find they have a strong personal interest and are competently and vigorously represented by legal counsel, and we certify this as a valid class action as to all.

Before leaving the question of standing we note that Parents Aid and Dr. Zupnick by hypothesis cannot lawfully, with exceptions too unusual for us to be concerned with, perform abortions upon minors incapable of consenting. Nonetheless, we hold that they do have standing to attack the statute as applied to all minors, at least insofar as it requires the consent of both parents. We find nothing about abortions that requires the minor's interest to be

treated differently from other medical and surgical procedures, as to which we find the custom to be to proceed on the consent of one parent.

Controversy.

Defendants contend that there is no "case or controversy" because none of the plaintiffs has been actively, or affirmatively, threatened with criminal proceedings. However, this is not the test. Plaintiffs need not act so as to precipitate their prosecution under a statute they wish to challenge as unconstitutional in order to constitute a case or controversy. Nor must they show that prosecution has been actively or verbally threatened in order to establish that the government's posture is adverse. *See Doe* v. *Bolton*, ante. 410 U.S. at 188. Rather, we must make a realistic appraisal of the total circumstances to determine whether the prospect of enforcement of the statute is "chimerical," *Steffel* v. *Thompson*, 1974, 415 U.S. 452, 459, or "concrete," *Aetna Life Ins. Co.* v. *Haworth*, 1937, 300 U.S. 227, 240. *Cf. Younger* v. *Harris*, 1971, 401 U.S. 37, 42; *Abele*, ante, 452 F.2d at 1125; *Acevedo Montalvo* v. *Hernandez Colon*, D.P.R., 1974, 377 F.Supp. 1332, 1334 (per curiam). We find that the subject of abortions has excited a great amount of feeling in Massachusetts; that the defendants, as is evident from their activities in this case, are satisfied that the statute is constitutional; that there will be extensive pressure upon them to prosecute in case of a violation, and that it is highly improbable that they would not immediately respond to such pressures. Baird testified that he had been arrested without warning in connection with the Massachusetts birth control statute, so-called, and we believe that public opposition to abortion is more organized and more vocal than was the opposition to birth control. Under all the circumstances we find that plaintiffs had every reason to believe that they had only

two alternatives, to continue their current activities and face immediate arrest, or to bring the present suit.

The "controversy" requirement, like the standing requirement, is to assure that there will be a vigorous contest with active participation on both sides by parties immediately interested, as distinguished from parties engaging in theoretical disputes as an intellectual pastime. *See Roe* v. *Wade*, ante, 410 U.S. at 123; *Golden* v. *Zwickler*, 1969, 394 U.S. 103, 108; *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.*, 1941, 312 U.S. 270, 273. It is correspondingly requisite that the court's time not be wasted. We find that the present case fits the requirements in both respects, and hold that there is sufficient controversy.

The Underlying Facts.

We were offered nearly three days of testimony. The principal purpose, as we gather it, was to demonstrate on the one side the need, and on the other the objections; the interests served, and the interests countered, by the statute. In some areas there was considerable disagreement between the experts. We do not propose to resolve those disagreements. Even though in some instances our findings might not correspond with defendants' experts, we may accept their factual evidence for present purposes in cases of conflict because, either way, our ultimate conclusions would be the same. It is to be understood that throughout this opinion, unless the contrary is noted, we are talking about abortions during the first trimester.

There are presently three common methods of performing an abortion; injection of a saline solution; the so-called vacuum method, and a hysterotomy. The first two are performed under local anesthesia. The vacuum procedure, apparently the one generally performed by Dr. Zupnick, requires five to seven minutes. It is followed by minor bleeding and occasional pains, spanning perhaps three to

six weeks. There is a possibility of infection and other complications, as with any procedure, and there is a possibility, minor, or very remote, depending on whose testimony is accepted, of subsequent sterility. Plaintiffs' doctors, who had performed a very substantial number of first trimester abortions, gave a very low percentage of complications or "morbidity" in the case of lawful, as distinguished from illicitly performed abortions. Defendants' doctor's considerably higher figure we attribute to the fact that he does not do abortions as such, but only "terminates pregnancy" when there is already some medical necessity. Even he did not suggest any greater risks for minors than for adults.

In addition to such physiological risks, there are possible emotional risks. Abortion is commonly looked upon as offering "instant relief." In many cases this may be so, but in some it may be followed by various feelings of guilt. We also respect defendants' expert's view that it is undesirable to make too speedy a decision. At the same time we note his opinion that this decision, as the minor reaches the end of the first trimester, has great psychological as well as medical weight, and should be made as soon as possible.

All experts agreed that pregnancy in an unmarried minor is a period of great emotional stress; that support is needed, and that parental support, if forthcoming, is most desirable. Probably most parents are supportive. We are obliged to find, however, that an appreciable number are not, for a variety of reasons. Moreover, as may be the case with Mary Moe's father, parents may seek to control sexual behavior by threats that they do not mean, or would not carry out in the actual eventuality, but which nonetheless serve to destroy intercommunication.

We must find, however, that a significant number of minors who are capable of consenting are unwilling to tell

their parents, either because they correctly fear what would happen to themselves, or, although they would expect support from their parents in one sense, they know their parents would under no circumstances consent to the abortion they wish, or, because of their views on illegitimacy and the stigma attaching to unmarried mothers, would attempt to make them enter into a marriage they do not want.

There are also minors who, understandably, do not wish to have their parents know of their condition because of the distress that it would cause them, and the minor's own consequent feelings. While we shall not deal with this aspect further, we note that in a very real sense it precisely fits standard concepts of the right of privacy.

From the standpoint of parents, we believe that most would wish to know of their daughter's pregnancy, and we may assume that most would seek to be supportive. However, we cannot think that all would be. We accept the testimony of plaintiffs' experienced expert that some parents would insist upon the continuance of the pregnancy simply as a punishment, or to teach a lesson. We might find difficulty in regarding this reaction as other than unusual if we did not recall that the Commonwealth itself argued in *Baird* v. *Eisenstadt,* 1 Cir., 1970, 429 F.2d 1398, 1401, *aff'd,* 405 U.S. 438, that the prevention of fornication is so important that it justified withholding birth control devices from unmarried adults, with the resultant risk of pregnancy. The fact that the Court of Appeals expressed shock at this view does not mean it does not exist, but merely illustrates the degrees of variance and the strength of opinions on this subject.

Of unquestionable numerical importance, we cannot overlook the fact that many parents believe with total sincerity that abortion is morally impermissible, either under all circumstances or unless to save the life of the pregnant

woman. This leads to the significant contention pressed upon us by defendants as well as by intervenor, that some parents believe that they have separate rights as parents, and that there is a family interest, separate and apart from that of the minor. These interests, which are asserted to be of constitutional proportions, they variously describe as "parents' liberties;" the parents' right to "control," and their right to "promote and preserve the family as an important societal unit." These rights, being, by hypothesis, antithetical to the minor's, it may not be unnatural for the minor to feel that she is in trouble enough without having to become subservient to claims of others.

We have not stated all of the factual issues in this difficult area, but we believe we have stated enough to delineate the issues for present purposes. More facts will appear later when relevant.

The Minor's Consent.

The greatest divergence in the testimony related to the capacity of minors to give an informed consent.[8] At one extreme, Baird testified that in his many years experience he had never met a minor who was incapable, a conclusion supportable only on a hypothesis, which we reject, that an abortion, if not medically contra-indicated, is always the best solution, so that a minor who wants one must be presumed capable. We are also not impressed by the observation in *Washington* v. *Koome,* Wash., 1975, 530 P.2d 260, which recognized a 16-year old's consent, that "[t]he age of fertility provides a practical minimum age requirement for consent to abortion, reducing the need for

[8] We are not dealing in this case with legislation directed to the legal capacity of minors to consent to a medical or surgical procedure. *Cf. Younts* v. *St. Francis Hospital and School of Nursing, Inc.*, Kan., 1970, 469 P.2d 330, 336-38; *Smith* v. *Seibly*, Wash., 1967, 431 P.2d 719, 722-24. For reasons we shall come to, the statute goes far beyond such a principle.

a legal one." Fertility marks a physical, not emotional or intellectual maturity, and a "fertile" minor may become pregnant precisely because she lacks the capacity to reason and consent maturely. No expert testified that every minor of any age was able to make a considered decision.[9] Of necessity, there will be factual questions to weigh in each case.

Plaintiffs' experts were of the view that a majority of 16 and 17 year olds are capable. Defendants' experts, although they felt that essentially all are capable at 18, considered the 18th birthday a significant turning point, and would concede only a substantial minority at age 17. Whatever may be the value of conclusive presumptions making the 18th birthday a turning point for such matters as voting, the purchase of liquor, and entering into contracts other than certain contracts for necessaries, *cf. J. G. Pierce Co.* v. *Wallace,* 1925, 251 Mass. 383, we can attach no such factual magic to that birthday. We may also remark, parenthetically, that it is singular for the state to provide that a minor may consent to intercourse at age 16, Mass. G.L. c. 265, § 23 (statutory rape), but cannot consent to get rid of the product until she is two years older. But whichever experts are correct, it is enough for present purposes that we find that a substantial number of females under the age of 18 are capable of forming a valid consent. Our overall question, accordingly, is whether the state can be permitted to restrain the free exercise of that consent, to the extent that it has endeavored to do so.

We consider first what the statute does not do.

1. The statute does not purport to require simply that parents be notified and given an opportunity to communicate with the minor, her chosen physician, or others. We mention this obvious fact because of the persistence of defendants and intervenors in arguing that the legislature could properly enact such a statute. Whether it could is not before us, and there is no reason for our considering it.

2. The statute does not exclude those capable of forming an intelligent consent, but applies to all minors. The statute's provision calling for the minor's own consent recognizes that at least some minors can consent, but the minor's consent must be supplemented in every case, either by the consent of both parents, or by a court order.

3. The statute does not purport simply to codify what we find to be accepted medical practice in Massachusetts hitherto, namely, that certain medical procedures involving minors require the consent of a parent. This statute creates a special, unique exception by requiring the consent of both parents.

4. The statute does not purport simply to provide a check on the validity of the minor's consent and the wisdom of her decision from the standpoint of her interests alone. Rather, it recognizes and provides rights in both parents, independent of, and hence potentially at variance with, her own personal interests. On being told by the court during argument that this appeared to be the statutory meaning, counsel agreed. It is the Commonwealth's position "that a parent in the decision-making process can consider interests other than the minor's. . . . The concept of liberty . . . embraces parental rights of supervision and control over children, and really what we are dealing with are competing rights of a constitutional dimension." Intervenor took the same position. We agree that this is the clear statutory intent. Whatever may be accorded to the minor by allowing her judicial review "for good cause shown," we do not regard it as meaning that the court should reverse a refusal of consent it finds reasonably made in the parent's interests.

[9] We find quite credible defendants' expert who testified that at certain periods of their lives adolescents might react maturely one day and immaturely the next.

5. As a corollary to the foregoing, the statute is not to be weighed in terms of permissible overbreadth, unavoidably applying to minors in fact capable of consenting because necessary for proper administration or enforcement with respect to minors considered incapable. The legislature made no such determination. Rather, the direct purpose is to encumber the rights of all minors facially coming within its terms.

We make this extensive analysis, which we take it all parties are in agreement with,[10] to demonstrate the two basic issues: the minor's personal rights, and the separate rights of the parents.

The Minor's Rights.

Passing for the moment the question whether there are conflicting rights, there can be no doubt but that a female's constitutional right to an abortion in the first trimester does not depend upon her calendar age. While the Court in *Roe* v. *Wade,* ante, 410 U.S. at 165 n.67, failed to pass upon whether there were any special rights in the state, or elsewhere, that could be of greater significance when the female is a minor, the Court in no way suggested that a minor lacked personal rights. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone," *In re Gault,* 1967, 387 U.S. 1, 13; *see Coe* v. *Gerstein,* S.D.Fla., 1974, 376 F.Supp. 695, 698; *Merriken* v. *Cressman,* E.D.Pa., 1973, 364 F.Supp. 913, 918-19; *Washington* v. *Koome,* ante, 530 P.2d at 263; Note, the Minor's Right to Abortion and the Requirement of Parental Consent, 1974, 60 Va.L.Rev. 305, 316-19. *Cf. In re Winship,* 1970, 397 U.S. 358, 365; *Stull* v. *School Board of Western Jr.-Sr. High School,* 3 Cir., 1972, 459 F.2d 339, 345. We see no room

[10] The dissent is seemingly of the opinion that a reviewing Superior Court judge would consider only the interests of the minor. We find no room in the statute for so limited an interpretation.

cannot be subordinated to the state any more than can be an adult's. We say this because, as previously pointed out, the statute is cast not in terms of protecting the minor, *cf. Ginsberg* v. *New York,* 1968, 390 U.S. 629, 638; *Prince* v. *Massachusetts,* 1944, 321 U.S. 158, 168, but in recognizing independent rights of parents. In this circumstance the statute does not attain validity vis-a-vis the minor by virtue of her ability (such as it is) to appeal to a Superior Court judge; this is merely a constraint on the assertion of unreasonable claims of her parents. The question comes, accordingly, do parents possess, apart from right to counsel and guide, competing rights of their own?

The Competing Rights of Parents.

The importance of the last-mentioned distinction is not to be overlooked. It is not to deny parents all rights if we invalidate this statute. As intervenor herself well illustrated, parents have years in which to teach their children, counsel them, and guide them. We may wonder how much would be accomplished by compulsorily affording a parent an eleventh hour opportunity, if adequate communication had not been established before. And we may wonder, also, whether imposing such burden on the minor would necessarily improve the family relationship. But this, as we have said, is not the statute's aim. The parents not only must be consulted, they are given a veto. Defendants do not like this word. The fact, however, that because of the right of appeal this veto may not be absolute, modifies it only to a degree. So long as parents' independent rights may be enforced, they remain formidable.

Except to assert that such rights exist, defendants and intervenor do little to demonstrate why parents should be granted individual rights independent of the minor's best interests. It is not they who have to bear the child. Once born, the minor, and not they, will be responsible for it

in all senses, financially and otherwise.[11] It is difficult to think of any self interest that a parent would have that compares with those significant interests of the pregnant minor.

Turning from discussion to decided authority, the cases cited by defendants and intervenor involving rights of parents uniformly concern situations where the parents' claimed rights are compatible with the minor's, not adverse. Such cases are of no assistance. Of course parents have rights in proper instances, to act in their children's interests. What is claimed here is something altogether different. But even if it should be found that parents may have rights of a Constitutional dimension vis-a-vis their child that are separate from the child's, we would find that in the present area the individual rights of the minor outweigh the rights of the parents, and must be protected. The single exception to this is *Planned Parenthood* v. *Danforth,* E.D.Mo., (1/31/75). We do not agree with the majority opinion.

Consequently, the parental consent requirement of Massachusetts General Laws, Chapter 112, Section 12P, is constitutionally invalid. Judgment will be entered permanently enjoining defendants from enforcing Chapter 112, Section 12P, as it relates to parental consent in any fashion. Plaintiffs to have their costs. Attorneys' fees against defendants are denied.

So ordered.

(s) BAILEY ALDRICH
U. S. Circuit Judge
(s) FRANK H. FREEDMAN
U. S. District Judge

[11] If we may take note of a comment made by a defender of such statutes on W. Buckley's *Firing Line*, Feb. 9, 1975, Southern Educational Communications Ass'n, Publisher, that having refused consent for an abortion the parents "assume a major responsibility to the infant who is going to be born," one may hope this would be so, but it would be naive not to envisage many exceptions. The statute places the burden of all exceptions on the minor.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL,

DEFENDANT-INTERVENOR.

Before ALDRICH, *Senior Circuit Judge,*
JULIAN, *Senior District Judge,*
and FREEDMAN, *District Judge.*

DISSENTING OPINION

April 28, 1975

JULIAN, S.D.J. (dissenting):

I disagree with the decision of the majority. I would hold that the challenged statute [1] is constitutionally valid.

[1] That statute, Mass. G.L. c. 112, § 12P, provides:

"(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or has deserted his or her

It is also my opinion that in these proceedings the defendants and the parents of "Mary Moe," the 16-year-old plaintiff, have been deprived of their legal rights without due process of law.

I shall address the latter issue first.

The minor plaintiff in this case is an unemancipated, unmarried, high-school girl living with her parents and the rest of their family. At the time this action was brought she was pregnant and had been for about eight weeks. Within a matter of hours after the single judge issued a temporary restraining order enjoining the enforcement of the statute, Dr. Zupnick, a plaintiff, performed the abortion on the girl. Her parents were not consulted. They have no knowledge of the girl's pregnancy or of the abortion. They have no knowledge of the pendency of this action. The majority of the Court denied defendants' motion that the parents be joined as parties to the action. The name "Mary Moe" is a fictitious name. She has withheld from her parents all information concerning her pregnancy and the abortion. She has been permitted by the Court to withhold her name and address and the names and address of her parents from the defendants as well as from the Court itself. The majority went further and ordered the defendants not to make any attempt to discover her identity or the identity of her parents.[2] The majority have thus made it impossible for the defendants to call the parents as witnesses at the trial or to take their depositions. The minor testified at the trial and the majority have made findings of material facts on the basis of her uncorroborated testimony. Some of the findings relate to the parents and reflect adversely upon their performance of their parental duties. The concealment of the identity of the parents precluded the defendants from rebutting the girl's testimony and from impeaching her credibility. They were also precluded from presenting evidence concerning the degree of maturity that the girl had attained[3] and the competence, fitness and willingness

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family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who has assumed the care and custody of the mother is sufficient.

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section 12R."

If the written consent of the proper person or persons has not been delivered to the physician performing the abortion as set forth in § 12P, and if an emergency requiring immediate action does not exist, no abortion may be performed. Mass. G.L. c. 112, § 12N. Any person who willfully violates the provisions of § 12N shall be fined not less than $100 nor more than $2,000. Mass. G.L. c. 112, § 12Q. The statute also allows the attorney general or any person whose consent is required pursuant to § 12P or common law to petition the state's superior court for an order enjoining performance of an abortion that may be performed contrary to the provisions of c. 112, §§ I-Q. Mass. G.L. c. 112, § 12R.

Roe v. *Wade*, 410 U.S. 113 (1973), at 153-154, 163, requires that a woman who consents to an abortion must also obtain the consent of a physician. Mass. G.L. c. 112, § 12P, also requires an additional consent when a minor is to have the abortion—the consent of the minor's parents, and further provides that if the parents do not consent, the consent may be obtained by court order.

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[2] Appropriate precautions to prevent public disclosure of the minor's identity would have sufficed. There was no need for the Court to suppress the disclosure of probable sources of relevant evidence.

[3] The majority find as a fact that "Mary Moe is of ample intelligence to, and in fact does, fully understand the nature of this action." The evidence before this Court is insufficient to justify such a finding. Plaintiff minor has not been shown by the evidence to possess a higher degree of intelligence than the average adolescent of her age. Based on the general experience of mankind, judicial notice may be taken that the average adolescent of sixteen does not "fully understand" the difficult substantive issues raised by this action.

of her parents to act as her guardians in this litigation and look after her best interests.[4]

Adjudication of this case significantly affects constitutional, statutory and common-law rights of the parents. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale,* 68 U.S. 223, 233 (1863), as quoted approvingly in *Goss* v. *Lopez,* 43 U.S.L.W. 4181, 4185 (U.S. Jan. 22, 1975).[5] Since the majority have made this a class action,[6] the temporary restraining order issued by a single judge and extended by the majority irreparably abridged not only the rights of the parents of plaintiff Mary Moe, but also the rights of the parents of all unmarried pregnant minors under the age of 18, that is, girls from about 12 years of age through 17, whose daughters have been aborted without any notice to the parents. The decision of the majority deprives the parents of their parental rights without notice or opportunity to be heard concerning the existence of those rights. These parents have thus been deprived of their parental rights without due process of law. *Roller* v. *Holly,* 176 U.S. 398 (1900); see *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 123 (1968); Federal Rules of Civil Procedure 12(b)(7), 19; 7 Wright & Miller, Federal Practice and Procedure: Civil § 1602 at 20 (1972). A decision entered in violation of the essential requirements of due

[4] The courts require a strong case to be made before they will interfere, or permit strangers to interfere, with the parents' guardianship. See, generally, "Readings in the History and System of the Common Law," Pound and Plucknett, 3d ed., 1927, at p. 496.

[5] *Roller* v. *Holly*, 176 U.S. 398, 409 (1900): "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight; . . . ."

[6] In my view, the majority have failed to comply with the requirements of Rule 23 of the Federal Rules of Civil Procedure relating to class actions.

process of law is void. *Bass* v. *Hoagland,* 172 F.2d 205, 209 (5 Cir.), *cert. denied,* 338 U.S. 816 (1949); *United States* v. *Manos,* 56 F.R.D. 655, 659 (S.D. Ohio, 1972); *see Roller v. Holly, supra.*

The majority have deprived the parents of the minor plaintiff of their parental rights without due process of law. The procedure followed in this case has also effectively deprived the defendants and intervenor of their right to call and examine witnesses before and during trial and to test the veracity of the minor plaintiff as a witness.

In addition to refusing to permit joinder of the parents as parties to this action, the majority have refused to appoint a guardian ad litem for the minor, thus leaving her without the protection of her natural guardians and of a court-appointed guardian.

The majority's stated reason for its failure to appoint a guardian ad litem for the minor is that

> "Her interests in the facial interpretation of and effect of the statute are fully represented by her competent counsel, and to the extent that there may be thought to be any conflicting interests, by the action of competent counsel for the intervening parent."

Counsel for the plaintiffs was never appointed guardian ad litem for the minor plaintiff and never purported to act as her guardian. At no time before or during trial was he ever informed that he was guardian ad litem for the minor plaintiff. Except as to the issue of the constitutionality of the state statute, the record fails to disclose that counsel for the plaintiffs had the slightest concern for the welfare of the minor plaintiff. The record shows that his sole objective was to have the state statute declared unconstitutional for the benefit of the adult and corporate plaintiffs by eliminating it as a legal obstacle to the performance of abortions on minors under the age of 18. The Court should have appointed a guardian ad litem for the minor

plaintiff to ensure proper representation of her interests. See Federal Rules of Civil Procedure 17(c).

Counsel for the minor plaintiff and her "class" was also counsel for the other plaintiffs whose real interests conflicted with those of the minors. The plaintiffs other than the minors receive substantial income from the abortions performed on minors and thus have a financial interest in the outcome of this litigation. Parents Aid Society, Inc.,[7] receives fees for abortions which it shares with the abortionist, Zupnick.[8] Baird insists that he does not receive

[7] On all the pertinent evidence it is more probable than not that Parents Aid Society, Inc., is Baird's alter ego.

[8] Zupnick lives in New York. He commutes to Boston to perform abortions on two days each week. The Boston abortions are not the full extent of his practice, however. Zupnick also performs abortions in New York two days each week. Zupnick's medical practice is limited to performance of first trimester abortions in facilities of Parents Aid Society, Inc., in Boston and New York. Zupnick is paid well, as his testimony shows:

"Q. Is there a maximum price for an abortion at Parents Aid Society?

"A. Yes. The abortion fee is on a sliding scale from the patient's ability to pay to a maximum of $150.

"Q. In the case where $150 is charged, what do you receive in that instance?

"A. Usually a third.

"Judge Freedman: Is that paid on a monthly basis?

"The Witness: No. It is paid on a daily basis. I am given a check at the end of the day.

"Q. What was the amount of the last check that you received from the Parents Aid Society?

[An objection is stated and overruled]

"A. I honestly don't recall the exact figure. I believe it was in the area of $600.

"Q. You have received checks higher than that amount?

"A. Higher and lower, yes.

"Q. Does that constitute reimbursement for two days work?

"A. That is correct.

* * * * *

"Judge Freedman: I would be interested, Doctor, in the number of abortions you performed—the percentage of those that incorporate fees of the maximum $150 as opposed to those that are actually free.

funds from Parents Aid Society, Inc.: "[N]ot one penny has come to me in eleven years." (December 31, 1974, Tr. p. 120). Baird's wife, however, receives funds from Parents Aid Society, Inc., in Baird's words: "because I was not earning enough money to feed her and the family." (*Id.*)

The plaintiffs, including the minor, were represented by the same counsel. Parents Aid Society, Inc., Zupnick, Baird, and Baird's wife and children, however, directly or indirectly, derive financial advantage from the abortions. The financial interests of those plaintiffs, however, are in conflict with the minor's "very real need . . . to have her own personal rights and interests protected." *Noe* v. *True,* 507 F.2d 9, 12 (6 Cir. 1974).

The interests of the minors in this litigation are of a different nature and far more important than the monetary interests of the other plaintiffs. They are in collision and should not have been represented by the same counsel. Advocacy on behalf of the minor should have sought to protect her from possible overreaching on the part of adults such as Baird or Zupnick. No consideration appears to have been given to the possibility that the abortion may have been adverse to her best interests. Counsel made

"The Witness: As I said before, it is not always free or $150. It is on a sliding scale basis. If you are asking me how many patients pay the total of $150 fee—

"Judge Freedman: Yes. How many people pay no fee on a percentage basis?

"The Witness: I would say probably about two-thirds pay the $150 fee and probably about 15% are done for free, and then there is a scale in between on the other patients. . . .

* * * * *

"Q. When the patient walks into the operating room, typically that is the first time she has met you?

"A. Usually, yes.

"Judge Freedman: How long does the typical abortion procedure last?

"The Witness: The average technical part of the procedure is five to seven minutes."

(December 31, 1974, Tr. pp. 15-17, 28.)

no attempt to determine the emotional impact the abortion might have on her.

The interests of the minor plaintiff were not adequately represented. The Court should not have deprived the minor of the guidance, counsel and care that her parents were under a legal obligation to provide, and might have provided if her condition had not been concealed from them. If the parents had been informed and nevertheless had failed to act, the Court should have assumed the ultimate responsibility for any determination made on behalf of the minor by appointing a guardian ad litem.[9] See *Noe* v. *True*, 507 F.2d 9, 11-12 (6 Cir. 1974).

The majority find that Mary Moe was competent to make and effectuate the decision to abort. The majority also find there are other unmarried pregnant minors in Massachusetts who have adequate capacity to give a valid and informed consent to an abortion. These findings are not warranted by the evidence.

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[9] In *Foe* v. *Vanderhoof*, Civ. A. No. 74-F-418 (D. Colo., Feb. 5, 1975), which is relied upon by the majority, the court did not appoint a guardian ad litem. The court found the emancipated minor plaintiff's interests were fully protected by her counsel and social worker. Counsel, however, did not represent conflicting interests. Moreover, the *Vanderhoof* court found that the plaintiff had met with her mother, doctor and social worker to discuss her pregnancy, abortion procedures and the consequences of the decision. The *Vanderhoof* court also appointed an obstetrician and a psychiatrist to examine and counsel the plaintiff. The appointed doctors agreed she should have an abortion. The *Vanderhoof* court thus assumed responsibility for determinations made on the minor's behalf. In contrast with the meticulous procedure in *Vanderhoof*, Mary Moe, for example, had perfunctory contact with the attorneys and abortionists. No professionals were appointed to examine or counsel her prior or subsequent to the issuance of the temporary restraining order or performance of the abortion. The majority's failure to take any precautions for the protection of the minor's best interests is particularly ironic since Mass. G.L. c. 112, § 12P, which the majority strike down, allows recourse to the state court when parental consent is denied. The state court would have been able to protect th minor's best interests as did the *Vanderhoof* court.

In order for consent to be informed, a minor must understand the emotional as well as the physical consequences which may follow from an abortion. The testimony of the psychiatrists is unanimous on this point. Tr. of testimony of Dr. Carol Nadelson, assistant professor of psychiatry at Harvard Medical School, December 30, 1974, pp. 118, 127-132; Tr. of testimony of Dr. Raymond C. Yerkes, child psychiatrist, Director of the Child Service at the Greater Lawrence Mental Health Center, January 28, 1975, pp. 50-52. No testimony was offered, however, concerning the emotional consequences the abortion may or will have upon Mary Moe. No testimony was presented concerning Mary Moe's understanding of those consequences or her ability to understand them. In making their findings the majority must necessarily have applied a test of informed consent which looks only to the minor's ability to understand the consent form, surgical procedure and direct physical effects. The majority disregard that aspect of informed consent which requires that a minor must understand the emotional consequences which may follow an abortion.

Parents have rights and responsibilities that inhere in the parent-child relationship and stem from the fact, nature and purpose of parenthood. These rights and responsibilities are not inimical to the minor's rights and welfare. They exist for the benefit of the child and protection during the child's formative years. The state has a compelling interest in protecting the parental rights and duties against unauthorized intrusion by third persons. The statute under attack expresses this compelling interest.

The liberty guaranteed by the Fourteenth Amendment "denotes . . . the right of the individual . . . to marry, establish a home and bring up children, ..." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). The Constitution guarantees

"the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Pierce v. *Society of Sisters,* 268 U.S. 510, 534-535 (1925). See *Roe* v. *Wade,* 410 U.S. 113, 152-153 (1973); *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944); see also *Weinberger* v. *Weisenfeld,* 43 U.S.L.W. 4393, 4398 (U.S. March 19, 1975). This right and duty of the parents to prepare the child for additional obligations "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin* v. *Yoder,* 406 U.S. 205, 233 (1972).

The Commonwealth of Masachusetts recognizes that a child benefits from parental guidance and protection and fully acknowledges the freedom and responsibility of parents to direct the upbringing of their children. *Commonwealth* v. *Brasher,* Mass. , 270 N.E.2d 389, 394 (1971).[10] Indeed, it is the articulated policy of Massachusetts to strengthen and encourage family life for the protection and care of the child. Mass. G.L. c. 28A, § 1; c. 119, § 1.

The question of the constitutionality of statutes requiring parental consent to the abortion has been explicitly left open in *Roe* v. *Wade,* 410 U.S. 113 (1973).[11] There is nothing in that opinion or in the opinion in the companion

[10] Mass. G.L. c. 112, § 12P, is one of many state statutes designed to protect the child from her own improvidence and from overreaching by adults by requiring parental consent as a prerequisite to the child's engaging in a specified activity. *E.g.*, Mass. G.L. c. 131, § 14; c. 140, §§ 131, 179; c. 207, § 7; c. 208, § 30; c. 210, § 2; c. 248, § 35; c. 272, § 1.

[11] At page 165, n. 67, the Court stated: "We need not now decide whether provisions of this kind [provision requiring parental consent] are constitutional."

case of *Doe* v. *Bolton, id.,* at page 179, that abrogates or erodes the rights and responsibilities of parents. Those decisions do not remove the pregnant, unemancipated minor from the care and custody of her parents. The parents still remain her natural guardians with undiminished responsibility for her welfare.

The State parental consent statute protects an interest which is completely separate from the State's interest in the protection of the pregnant woman's health or the unborn child's life. The statute protects the right of the parents to the liberty guaranteed them by the Fifth and Fourteenth Amendments. The statute protects the family relationship, the right and duty of parents to bring up their child, the right and duty of parents to inculcate moral standards; the statute provides protection for the parents' right and duty to make reasonable decisions, in the first instance, for the control and proper functioning of the family as a harmonious unit. The statute ensures that parents will have the opportunity to guide and counsel their daughter, and play a supportive role during and after the pregnancy.[12]

[12] Mrs. Jean Hunerwadel, the intervenor, holds a B.S. in Early Childhood Education and Child Development from St. Joseph's College, West Hartford, Conn. She has worked at the James Jackson Putnam Children's Center Clinic for emotionally disturbed pre-school children and as a kindergarten teacher and director of a nursery school. Mrs. Hunerwadel's testimony concerning the role of parents is pertinent and helpful:

"Q. Now, I ask you this, Mrs. Hunerwadel, are there circumstances in which you would consent to an abortion to be performed on one of your daughters were she to be found to be pregnant, unmarried and under age 18?

"A. Yes, there are.

"Q. Tell us what those circumstances would be.

"A. We would like to understand the circumstances which led to her pregnancy, the circumstances in her life. We would like to know about the boy by whom she became pregnant, about her feelings about the pregnancy, her feelings about the baby, her feelings about the boy who would be the father of

The majority attack the statute because it requires the consent of both parents. Parental rights and duties, however, inhere in both parents by reason of their parenthood

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the child. We would like to be able to make available to her our support and our interest and our care as we have from the time that we have known she was coming to us.

"We would like to be sure that she has available all of the alternatives that are available to her and all of the resources in the community, and we would like the opportunity to have her know that we will continue to support her, and if she should decide, in spite of what we were able to show to her in terms of alternatives and support and how we felt, that she just must have an abortion, we would consent to that; that that would not be the end of our involvement.

"We would also want to be sure that she had a gynecologist-obstetrician whom we felt was professionally skilled, and beyond that, who had the qualities of interest and sensitivity and humanitarianism which we regard to be important in physicians; and we would also want to be sure that the facility that was chosen in which the abortion were to be done, because we do not regard the situation of unplanned pregnancy to be a separate situation which is begun, ended and then is out of the youngster's life.

"We feel that the youngster, as everybody does, brings feelings of circumstances into the situation and that also circumstances and feelings continue after, whether it is a completed pregnancy or an abortion.

"And we would foresee needing follow-up care for this youngster, psychiatrically, probably, at some time if not immediately.

"So those kinds of decisions would be very important to us to help her to make."

(January 28, 1975, Transcript pp. 77-78.)

The testimony of each medical expert, whether called by the plaintiffs or defendants, establishes the validity of Mrs. Hunerwadel's position. While the experts differ concerning the necessity for parental consent, each indicated that parental involvement in the abortion decision is helpful, benefits the child, and should be encouraged. Tr. of testimony of Dr. Somers H. Sturgis, emeritus professor in gynecology at Harvard University, Dec. 7, 1974, p. 27, Dec. 30, 1974, pp. 5-6, 8-9, 19; Tr. of testimony of Dr. Jane E. Hodgson, associate professor of obstetrics and gynecology at the University of Minnesota, Dec. 7, 1974, pp. 66-67, Dec. 30, 1974, pp. 75-77, 80-81; Tr. of testimony of Dr. Carol Nadelson, assistant professor of psychiatry at Harvard Medical School, Dec. 30, 1974, pp. 115-116, 119-121, 130; Tr. of testimony of Dr. Jules Rivkind, chairman of the

and are guaranteed equally to both parents by the Constitution. The statute before us recognizes that one parent cannot lawfully usurp the rights and duties of the other, *Weinberger* v. *Weisenfeld,* 43 U.S.L.W. 4393, 4398 (U.S. March 19, 1975),[13] and requires the consent of both except as otherwise provided in the statute.

Minors, of course, possess constitutional rights. Constitutional rights, however, are not absolute. Their exercise may be made subject to reasonable conditions.[14] The constitutional right of an adult woman to have an abortion, for example, has been conditioned by the Supreme Court upon the concurrence of a physician in her decision. The purpose of the condition is to provide a safeguard against the possibility of a medically inadvisable decision. See *Roe* v. *Wade,* 410 U.S. at 153. With respect to minors, the power of the state to limit or regulate the exercise of constitutional rights has been recognized by the Supreme Court. In *Ginsberg* v. *New York,* 390 U.S. 629 (1968), the Court, at page 638, states:

> "... [W]e have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults ....' *Prince* v. *Massachusetts,* 321 U.S. 158, 170."

Department of Obstetrics and Gynecology at Mercy Hospital, Pittsburgh, Pa., Jan. 28, 1975, pp. 15-18; Tr. of testimony of Dr. Raymond C. Yerkes, child psychiatrist, Director of the Child Service at the Greater Lawrence Mental Health Center, Jan. 28, 1975, pp. 47-50, 63-64.

[13] At page 4398: "And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection.' "

[14] "We . . . conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Roe* v. *Wade,* 410 U.S. 113, at 154.

See also *United States* v. *Bisceglia,* 43 U.S.L.W., 4242, 4243 (U.S. Feb. 19, 1975).

And again at page 639:

> "The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince* v. *Massachusetts*, supra, at 166."

I find, therefore, no conceivable constitutional objection to legislation providing in the case of a pregnant minor an additional condition designed to make certain that she receive parental or judicial guidance and counselling before having the abortion. The requirement of consent of both parents[15] ensures that both parents will provide counselling and guidance, each according to his or her best judgment. The statute expressly provides that the parents' refusal to consent is not final. The statute expressly gives the state courts the right to make a final determination. If the state courts find that the minor is mature enough

[15] The majority speculate concerning possible interpretations of the "for good cause shown" language. There is also some doubt whether the statute requires consent of one or both parents. The construction of the statute is a matter of state law. If the majority believe the only constitutional infirmities arise from their interpretation of the statute, the majority should certify questions of state law to the Supreme Judicial Court of Massachusetts pursuant to Rule 3:21 of that court in order to receive a definitive interpretation of the statute. See *Hendrickson* v. *Sears*, 495 F.2d 513 (1 Cir. 1974).

to give an informed consent to the abortion and that she has been adequately informed about the nature of an abortion and its probable consequences to her, then we must assume that the courts will enter the necessary order permitting her to exercise her constitutional right to the abortion. There is no basis for a contrary assumption.[16] In the case of an adolescent girl who finds herself in an emotional crisis of this kind it is important to make certain that she receive guidance and support from her parents who normally, more than any other person, have the strongest natural interest in her welfare. In the event that the parents refuse their consent, guidance and support will be provided by the state court judge in his role of parens patriae. The requirement of parental consent makes it necessary that the parents be informed and consulted about the girl's serious problem. The girl's condition would not then be concealed from her parents as has been done in this case with the cooperation of this Court as though her parents, whom we do not know and have not heard, were her natural enemies and not her natural guardians.

Parental rights and duties are recognized and guaranteed by the Constitution as necessary to the welfare of the minor children themselves, as well as of the family of which they are a part. The state has a compelling interest in the protection of these parental rights and duties. The statute is necessary to protect this compelling interest and is narrowly drawn to do just this. The statute is constitutional. *Planned Parenthood* v. *Danforth*, Civ. No. 74-416 C(A) (E.D. Mo. 1975), enforcement stayed, 43 U.S.L.W. 3451 (U.S. Feb. 14, 1975). The statute before us is specifically designed to protect pregnant minors under 18 years of age against their own improvidence due to immaturity of judgment, and against overreaching by others.[17] The enactment

[16] "Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsi-

of such a statute is a valid exercise of the state's police power and also of its power as parens patriae. *Ginsberg* v. *New York,* 390 U.S. 629 (1968); *Prince* v. *Massachusetts,* 321 U.S. 158 (1944).

The statute is a proper exercise of constitutional power by the Commonwealth of Massachusetts and is therefore valid. The decision of the majority deprives the defendants and the parents of the minor plaintiff of their legal rights without due process of law.

For these reasons I dissent from the decision of the majority.

(s) ANTHONY JULIAN
U. S. Senior District Judge

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bilities. This we refuse to do." *Huffman* v. *Pursue, Ltd.*, 48 U.S.L.W. 4379, 4385 (U.S. March 18, 1975).

[17] Massachusetts, like other states, has many laws, both decisional and statutory, designed to protect minors from their own improvidence and from possible overreaching. *See, e.g., Commonwealth* v. *Nickerson*, 87 Mass. (5 Allen) 518 (1863); M.G.L. c. 10, § 29; c. 90, §§ 8, 8A, 8B, 10; c. 105, § 3-207; c. 119, c. 127, § 22; c. 128A, § 10; c. 131, § 14; c. 138, § 34; c. 140, §§ 122, 130, 131, 179, 198; c. 147, § 35; c. 149; c. 191, § 1; c. 207, §§ 7, 9, 24, 25; c. 208, § 30; c. 210, §§ 2, 5A; c. 248, § 35; c. 265, §§ 13B, 22A; 23, 24B; c. 269, §§ 12A, 12B; c. 270, § 6; c. 272, §§ 1, 4, 28, 35A, 58.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

William BAIRD et al.[1]

v.

ATTORNEY GENERAL et al.[2]

January 25, 1977.

Before HENNESSEY, C.J., and QUIRICO, BRAUCHER and WILKINS, JJ.

WILKINS, Justice.

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[1] The plaintiffs are William Baird; Mary Moe, a pseudonymous unmarried minor residing in Massachusetts with

(Footnotes continued on page 2)

[1]her parents, who was pregnant at the time of the initiation of the action; Parents Aid Society, Inc., a Massachusetts non-profit corporation which, through its medical director and supporting personnel, provides abortions; and Dr. Gerald Zupnick, who is medical director of the corporation and performs abortions on a fee basis at the corporation's place of business two days a week.

[2] The defendants are the Attorney General of the Commonwealth and the several district attorneys in the Commonwealth. References to the defendants in this opinion do not include the intervening defendant (intevener) referred to subsequently.
[end of footnote]

We have before us a series of questions, certified to us by the United States District Court, District of Massachusetts, concerning various aspects of § 12P of G.L. c. 112, inserted by St.1974, c. 706, § 1, a section which sets forth certain conditions for the performance of an abortion on an unmarried minor. These questions have been certified to us on the prompting of the Supreme Court of the United States in Bellotti v. Baird, 428 U.S. 132, 151, 96 S. Ct. 2857, 2868, 49 L.Ed.2d 844 (1976). A brief statement of the process by which these questions have arrived here is appropriate.

In 1974 the Legislature adopted St.1974, c. 706, entitled "An Act to protect unborn children and maternal health within present constitutional limits." That act added several sections to c. 112 of the General Laws, including § 12P. Section 12P,

which is set forth in full in the margin,[3] is the principal target

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[3] "(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian,

of a constitutional challenge which the plaintiffs addressed to the

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(footnote cont.)

[3] or any person who had assumed the care and custody of the mother is sufficient.

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R."

[end of footnote]

Federal District Court on October 30, 1974. That section requires parental or judicial approval before a nonemergency abortion may be performed on an unmarried minor. In April, 1975, in a two to one decision, the District Court held that the parental consent provisions of § 12P were constitutionally invalid and ordered the entry of a judgment permanently enjoining the Attorney General and the various district attorneys from enforcing § 12P, "as it relates to parental consent in any fashion." Baird v. Bellotti, 393 F. Supp. 847, 857 (D. Mass. 1975). The law enforcement officials appealed, as did an intervening defendant, Jane Hunerwadel, a parent of an unmarried minor female of childbearing age. In the Supreme Court, the intervener argued that the District Court should have certified questions concerning the construction of § 12P to this court, pursuant to S.J.C. Rule 3:21,

359 Mass. 790 (1971), and that the District Court should have abstained from resolving any constitutional question until this court had answered those questions and construed § 12P.

On July 1, 1976, the Supreme Court of the United States accepted the intervener's argument and vacated the judgment of the District Court, holding "that the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of § 12P and the procedure it imposes." Bellotti v. Baird, 428 U.S. at 151, 96 S. Ct. at 2868. The Supreme Court noted that its decision on the same day in Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L.Ed.2d 788 (1976), struck down a statute that created a parental veto over an unmarried minor's right to obtain an abortion. Id. at 75, 96 S. Ct. at 2844. In its

opinion in the case now before us the Supreme Court stated that the defendants argued that § 12P could be construed not to contain a parental veto, and that, although the statute prefers parental consultation and consent, it permits a mature minor capable of giving informed consent to obtain a court order permitting an abortion without parental consultation if the abortion would be in her best interests. Bellotti v. Baird, 428 U.S. at 145, 96 S. Ct. at 2865. On the other hand, the plaintiffs argued in the Supreme Court that the statute gave parents an unbridled veto. Id. at 146, 96 S. Ct. at 2865.

In deciding that abstention was appropriate here, the Supreme Court did not indicate that the statute would be constitutional if interpreted as the defendants urged, but merely concluded that the statute was susceptible to the defendants'

construction and that the nature of the problem would change materially if the defendants' statutory construction were adopted. "[I]n the absence of an authoritative construction, it is impossible to define precisely the constitutional questions presented." Id. at 148, 96 S. Ct. at 2866. That Court recognized that it could not determine then what this court's interpretation might be, "what factors are impermissible or at what point review of consent and good cause in the case of a minor becomes unduly burdensome." Id. at 148, 96 S. Ct. at 2866. The Supreme Court, "assume[d] that [this court] will do everything in its power to interpret the Act in conformity with its title: 'An Act to protect . . . within present constitutional limits.'" Id. at 148 n. 16, 96 S. Ct. at 2866 n. 16.

Before turning to the specific questions asked of us, we should analyze our function in interpreting § 12P. The Federal District Court has the fundamental obligation to determine the Federal constitutional issue. Our role is to construe the statute. But, traditionally, we have regarded the presence of a serious constitutional question under one interpretation of a statute to be a strong indication that a different possible interpretation of that statute should be adopted, if the constitutional issue can be avoided thereby. Worcester County Nat'l Bank v. Commissioner of Banks, 340 Mass. 695, 701, 166 N.E.2d 551 (1960). See First Nat'l Bank v. Attorney Gen., 362 Mass. 570, 595-596, 290 N.E.2d 526 (1972) (Quirico, Braucher, & Kaplan, JJ., concurring), and cases cited. We think the Supreme Court recognized that we might engage in a construction

of § 12P so as to avoid, or at least limit, any constitutional problem. We think it is clear as well that, from its title, the Legislature intended to pass an act which was constitutionally acceptable and, even more important, to save as much of the statute's purpose as it could if any explicit statutory provision could not survive constitutional attack. Statute 1974, c. 706, § 2, provides that "[i]f any section, subsection, sentence or clause of this act is held to be unconstitutional, such holding shall not affect the remaining portions of this act."

Our principal advice to the Federal District Court is that we would construe § 12P to preserve as much of the expressed legislative purpose as is constitutionally permissible. The fact that the Supreme Court has not yet defined the permissible scope, if any, of parental

involvement in an unmarried minor's decision to seek an abortion makes certain of our constructions of § 12P potentially infirm. If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation.

We should not be understood to say, however, that we are entirely without guidance from the Supreme Court of the United States on the central issue involved here. In Planned Parenthood of Cent. Mo. v. Danforth, supra, four members of the Court, dissenting on the parental consent issue, joined in the view that parental consent was a constitutionally acceptable precondition to performing an abortion

on an unmarried woman under eighteen years of age. See id. 428 U.S. at 92-96, 96 S. Ct. at 2852-2853 (White, J., Burger, C.J., & Rehnquist, J., concurring in part and dissenting in part); id. at 101-105, 96 S. Ct. at 2856-2857 (Stevens, J., concurring in part and dissenting in part). Two Justices who joined in striking down Missouri's absolute parental veto expressed a view which seems to find acceptable a statute which "would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child." Id. at 91, 96 S. Ct. at 2851 (Stewart & Powell, JJ., concurring).

With those views of our role in this matter and of the unsettled state of the law on the permissible extent, if any, of parental involvement in an unmarried minor's abortion decision,

we turn to the nine questions certified to us. Each of the nine questions will be considered in order in sections of the opinion numbered to correspond to the number of the question being answered. The relevant question will be set forth in a footnote to the heading of each section.

1. The Statutory Standard for Parental Consent.[4]

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[4] "1. What standards, if any, does the statute establish for a parent to apply when considering whether or not to grant consent?

"a) Is the parent to consider 'exclusively . . . what will serve the child's best interest'?* (*Appellants' brief before the Supreme Court, p. 23. But cf. Baird v. Bellotti, D. Mass., 1975, 393 F. Supp. 847, at 855.)

"b) If the parent is not limited to considering exclusively the minor's best interests, can the parent take into consideration the 'long-term consequences to the family and her parents' marriage relationship'?* (*Defendants' brief in this court, p. 16.)

"c) Other?"

[end of footnote]

This question concerns the standard which should be applied by a parent in deciding whether to consent to an abortion for his or her unmarried daughter. The statute provides no explicit standard. In the District Court, the defendants agreed that a parent could consider matters not exclusively relating to the minor's personal interests. Baird v. Bellotti, 393 F. Supp. at 855. Before the Supreme Court, the defendants abandoned this position and argued that the only appropriate parental considerations were those which focused on the best interests of the minor. In light of the Court's opinion in Planned Parenthood of Cent. Mo. v. Danforth, supra, abrogating an absolute parental veto, we construe § 12P so as to avoid any constitutional question, as far as possible, and answer that the parent is to consider "exclusively . . what will serve the child's best

interest." We thus answer question 1(a) in the affirmative and need not answer questions 1(b) and 1(c). In many instances, the "best interest of the child" standard has been adopted in this Commonwealth where the rights and concerns of a minor have been in issue. See cases cited in our answer to question 3, infra at _____[a], 360 N.E.2d at 295-296.

There is, of course, no penalty if a parent does not apply the proper standard in deciding whether to consent to his or her child's request for consent to an abortion. Our answer may be of assistance, however, in guiding parents' consideration of the question and, as we explain in our answer to the next question, is of importance to any judge to whom the question of judicial consent is presented.

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[a] Mass. Adv. Sh. (1977) at 109-110.

2. The Statutory Standard for a Judicial Order Granting Consent.[5]

Section 12P provides that if one or both of the minor's parents refuse consent, "consent may be obtained by

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[5] "2. What standard or standards is the superior court to apply?

"a) Is the superior court to disregard all parental objections that are not based exclusively on what would serve the minor's best interests?

"b) If the superior court finds that the minor is capable, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision is a better one?

"c) Other?"

[end of footnote]

order of a judge of the superior court for good cause shown . . . ." Here there is a statutory standard of "good cause." The second question inquires concerning the role of the judge in applying the "good cause" standard.

We think it clear, answering question 2(a), that the same considerations referred to in answering question 1 must be applied by a judge of the Superior Court. He must disregard all parental objections, and other considerations, which are not based exclusively on what would serve the minor's best interests. If the judge were to exercise his authority on a standard broader than that to which a parent must adhere, we believe that the Commonwealth, through its judicial arm, could be exercising a power which the Supreme Court has said a State may not exercise. Planned Parenthood of Cent. Mo. v. Danforth, supra, 428 U.S.

at 75, 96 St. Ct. at 2844. In any event, the constitutional question is avoided, or at least limited, by our construction that "good cause" means that the judge may give consent to an abortion where it is shown that, in spite of the disapproval of one or both parents, the best interests of the minor will be served if the abortion is performed. In granting consent, the judge, of course, may impose reasonable conditions which will protect those best interests.

Question 2(b) concerns what a judge must do in passing on the question whether the best interests of the minor will be served. Unless a contrary conclusion is compelled constitutionally, we do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge

must make a determination of those circumstances, but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him. We suspect that the judge will give great weight to the minor's determination, if informed and reasonable, but in circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact.

3. Parental Consultation as a Requirement.[6]

Question 3 asks the extent to which, if at all, a court order for an abortion may be obtained without consultation with the minor's parents. The defendants argued before the Supreme Court, contrary to their earlier views (see Baird v. Bellotti,

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[6] "3. Does the Massachusetts law permit a minor (a) 'capable of giving informed consent,' or (b) 'incapable of giving informed consent,' 'to obtain [a court] order without parental consultation'?* (*See Supreme Court opinion, 428 U.S. p. 145, 96 S. Ct. p. 2865. Defendants contended to the contrary before us. See also, c. 112, § 12R.)"
[end of footnote]

393 F. Supp. at 855), that "a mature minor capable of giving informed consent [may] obtain . . . an order permitting the abortion without parental consultation," and that "even a minor incapable of giving informed consent [may] obtain an order without parental consultation where there is a showing that the abortion would be in her best interests." Bellotti v. Baird, supra, 428 U.S. at 145, 96 S. Ct. at 2865.

The defendants argue here that "if a minor has the capacity for informed judgment, the rationale for parental consent ceases . . ." and, in compelling circumstances, a court may grant consent to an abortion without parental involvement, both where the minor qualifies under "the mature minor rule" and where she does not. The defendants state that a case-by-case consideration will safeguard "the general role for parents contemplated by the

Legislature, without jeopardizing the statute's protective concerns." They argue, however, for "parental consultation in all but the most compelling situations."[7]

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[7] The defendants state further: "While it is difficult to describe the contours of such situations in the abstract, defendants suggest that generally parental consultation should be encouraged in mature minor cases. In other cases consultation should be required unless the Superior Court is convinced, after hearing, that consultation would threaten the minor's safety or well-being or otherwise adversely affect her best interests. Absent convincing proof of such danger, § 12P should be held to require the Superior Court to withhold authorization for abortion procedures until a minor's parents have been consulted."

[end of footnote]

The Legislature has left no room to apply a mature minor rule where an unmarried minor seeks an abortion without parental consultation. Section 12N of G.L. c. 112, inserted by St. 1974, c. 706, § 1, states that, in the absence of an emergency, no abortion may be performed unless "the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in [§ 12P]." Section 12N is all-inclusive, manifesting a clear legislative intention that the consent required by § 12P be obtained for every nonemergency abortion where the mother is less than eighteen years of age and unmarried. Section 12P in turn is explicit in stating that a judge should pass on an application for a consent order only after one or both parents have declined to consent to the abortion. Section 12P(1) states

that a judge may act "[i]f one or both of the mother's parents refuse . . . consent." Prior parental consultation is thus contemplated by the statute. If only one parent is available, he or she must be consulted. If neither parent is available, the minor's guardian, a person having similar duties, or any person who has assumed the care and custody of the minor must be consulted. We recognize, as G.L. c. 112, § 12N, states, that the consent provisions of § 12P have no application "in an emergency requiring immediate action," and presumably where no parent (or statutory substitute) is available. Although § 12N and § 12P do not deal with the situation where no parent (or statutory substitute) is available, we have no hesitancy in concluding that a judge is not barred from granting consent to an abortion in such a situation.

As we have indicated, it is not our function to determine whether parental consultation is a constitutionally permissible precondition to a court order. We point out, however, that there is no absolute parental veto inherent in § 12P. If the word veto has an application here, it is, by analogy to the legislative process, a veto which may be overridden. We also note that the views of the parents concerning the medical treatment which is to be furnished their child may have a beneficial influence (a) on the circumstances under which the abortion is to be performed, including the quantity and quality of pre-operative counseling, medical care, and personal attention, and (b) on the amount, source, and quality of post-operative assistance and counseling, including birth control counseling, which the minor will receive.

If these and other considerations in support of parental consultation do not justify mandatory parental consultation where there is no emergency and where at least one parent, or a person with equivalent responsibilities, is available, § 12P must be construed to require as much parental consultation as is permissible constitutionally. In such a situation, the judge will have to determine whether circumstances exist which make prior parental consultation impermissible constitutionally.

The defendants argue that the Legislature did not intend to abrogate any common law right to consent to an abortion which a minor had and that a mature minor at common law could obtain a valid court order authorizing an operation without prior parental consultation. We think that the effect of §§ 12N and 12P is clear in abrogating any such common law right to an abortion, assuming its existence.

The last paragraph of § 12P(2), which is set forth in n. 3 above, does not preserve any such common law right. Indeed, it suggests that any common law right of the minor is foreclosed. That language preserves "any common law rights of any <u>other</u> person" (emphasis supplied) relative to consent to the performance of an abortion for the purposes of a civil action or of a petition under G.L. c. 112, § 12R, to enjoin the performance of an abortion. That language does not refer to the minor.[8]

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[8] It is unclear whose consent the Legislature may have had in mind by this langauge in § 12P(2). Certainly it could not have been the potential father. Approximately four weeks prior to the enactment of St. 1974, c. 706, this court, by a divided vote,

(footnote continued)

We think, however, that it may be of assistance to the District Court to state the extent to which a mature minor rule of the character urged by the defendants would have been applicable if § 12P had not been passed. By doing so, we will disclose the impact of § 12P on the rights of minors.

A mature minor rule has been accepted in other jurisdictions, thereby relaxing the harshness of a rigid requirement of parental consent.

(footnote continued)

[8] determined that even a husband's consent could not be a condition precedent to the performance of an abortion on his wife (Doe v. Doe, 365 Mass. 556, 314 N.E.2d 128 [1974]), a view which was accepted by the Supreme Court in Planned Parenthood of Cent. Mo. v. Danforth, supra, 428 U.S. at 68-69, 96 S. Ct. at 2841.

[end of footnote]

See, e.g., Younts v. St. Francis Hosp. & School of Nursing, Inc., 205 Kan. 292, 301, 469 P.2d 330 (1970) (seventeen year old, skin graft to fingertip); Gulf & S.I.R. Co. v. Sullivan, 155 Miss. 1, 10, 119 So. 501 (1928) (seventeen year old, small pox vaccination); Lacey v. Laird, 166 Ohio St. 12, 14, 139 N.E.2d 25 (1956) (eighteen year old, plastic surgery to nose). See also 1 F. Harper & F. James, Torts § 3.10 at 235 & n. 23 (1956); W. Prosser, Torts § 18 at 103 & n. 51 (4th ed. 1971); Restatement (Second) of Torts § 59 (1965); Restatement of Torts § 892 (1939); Bennett, Allocation of Child Medical Care Decision-Making Authority; A Suggested Interest Analysis, 62 Va. L. Rev. 285, 289-290 (1976); Pilpel & Zuckerman, Abortion and the Rights of Minors, 23 Case W.Res.L.Rev. 779, 782-783 & n. 13 (1972). The mature minor rule calls for an analysis of

the nature of the operation, its likely benefit, and the capacity of the particular minor to understand fully what the medical procedure involves. See Wadlington, Minors and Health Care: The Age of Consent, 11 Osgoode Hall L.J. 115, 117-119 (1973). Judicial intervention is not required. If judicial approval is obtained, however, the doctor is protected from a subsequent claim that the circumstances did not warrant his reliance on the mature minor rule, and, of course, the minor patient is afforded advance protection against a misapplication of the rule.

Our cases have given no explicit sanction to the view that, without parental involvement, an unemancipated but mature minor may consent to an operation, where one or both parents are available and where there is no medical emergency. The defendants argue that the mature minor doctrine

has been applied by Justices of this Court when permitting a bone marrow transplant from a healthy minor to a critically ill sibling. However, in all of these cases, parental consent was obtained, and, in some cases, judicial approval of the operation was granted where the minor donor clearly was not one capable of granting an informed consent to the operation. These cases, therefore, involve both parental and judicial authorization of an operation and do not rely on the application of the mature minor rule. See Baron, Botsford & Cole, Live Organ and Tissue Transplants from Minor Donors in Massachusetts, 55 B.U.L.Rev. 159 (1975).

There are cases, however, where a minor's views have been permitted to influence judicial action. In custody matters, the well-being of the child is paramount (Vilakazi v. Maxie, _____

Mass. _____, _____[b], 357 N.E.2d 763 (1976) and the preferences of the child may be considered. Purinton v. Jamrock, 195 Mass. 187, 201, 80 N.E. 802 (1907). Dumain v. Gwynne, 10 Allen 270, 275 (1865). Curtis v. Curtis, 5 Gray 535, 537 (1855). A marriage ceremony involving a freely assenting minor, acting without parental consent, has been held valid, although, because of the minor's age, the ceremony was performed in violation of law. Parton v. Hervey, 1 Gray 119, 121 (1854). Where a child has been placed in someone's care by agreement of the parents, the wishes of the child to remain in that person's care have been given weight. Curtis v. Curtis, supra. Commonwealth v. Hammond, 10 Pick. 274, 275 (1830).

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[b] Mass. Adv. Sh. (1976) 2685, 2689-2690.

We have suggested that, if a minor of sufficient maturity assents to being taken from one having legal custody of him, the act would not involve the crime of false imprisonment. Commonwealth v. Nickerson, 5 Allen 518, 527 (1862). None of these cases, of course, concerns nonemergency medical treatment of an unemancipated minor wishing to act without parental involvement.

We have never held or implied on common law grounds that a physician may operate on a minor, where there is no emergency, without the consent of at least one parent. We have indicated that such an unauthorized operation constitutes an intentional tort. See Reddington v. Clayman, 334 Mass. 244, 246-247, 134 N.E.2d 920 (1956). The Legislature's treatment of the subject of consent to medical treatment of a minor has been consistent with the general common law

principle that parental consent is necessary for medical services to be performed in the absence of an emergency.[9]

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[9] General Laws c. 111, § 117, states that a physician's treatment of an assenting minor suffering from a venereal disease does not constitute an assault or an assault and battery.

General Laws c. 112, § 12E, authorizes a drug dependent minor twelve years of age or older to consent effectively to hospital and medical care related to the diagnosis or treatment of his or her drug dependency (except methadone maintenance therapy) and expressly disclaims any need for parental consent.

General Laws c. 112, § 12F, as appearing in St. 1975, c. 564, which

(Footnote continued)

Although our opinions do not explicitly support a mature minor rule, we have never been asked to apply such a principle. Particularly, we have never been asked to pass on the necessity of parental consent to a medical procedure to which a minor may be entitled by constitutional right. The case for a mature minor rule has

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(Footnote cont.)

[9] we discuss more fully below in answering question 6, sets forth a legislative mature minor rule (or perhaps an emancipated minor rule, or both), allowing consent for most medical and dental care, but the rule is inapplicable to abortions for minors who have never been married and does not include all minors who might qualify in particular circumstances for application of a mature minor rule.

[end of footnote]

particular force in such a case. This circumstance no doubt has prompted the Attorney General and all the district attorneys of the Commonwealth to urge that parental consultation is not always required in an abortion situation.

We conclude that, apart from statutory limitations which are constitutional, where the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth. In such a case, although judicial involvement is not required, court approval may be sought, and, if it is, a judge may give effective consent to the performance of an operation or other treatment. We have already indicated, however, that as to abortions there is

a statutory requirement of parental consultation. Thus we stress that the answer to question 3 is negative. Parental consultation for an abortion is required by statute in all cases, other than in an emergency or where there is no parent (or the equivalent) available. Our discussion of the mature minor rule as to operations generally has no application to nonemergency abortions because parental consultation, if possible, is mandated by statute. To the extent the District Court concludes that parental consultation is not permissible constitutionally, but only to that extent, is parental consultation not required. If there is a situation where parental consultation is not possible or where parental consultation (and notification) may not be imposed because of constitutional limitations, the judge should make precise findings

in support of his conclusion because, in such a case, the parents will not be involved and cannot challenge the judicial determination by appeal. These findings should include a determination of the degree of seriousness of the operation, its benefit to the minor, and the capacity of the minor to understand the circumstances and to consent to the operation.

Although we cannot say that there will never be a circumstance where parental consultation may be dispensed with where the minor is not capable of giving informed consent to a nonemergency operation, we expect that, as a general rule, the best interests of a minor will not be served by dispensing with consultation with the parents of such a minor. As we have said, however, as to abortion, parental consultation is mandatory.

4. Parental Notification.[10]

This question assumes that prior parental consultation is not required in all instances and inquires concerning the extent to which notification of the minor's parents may be ordered for good cause by a Superior Court judge either before or after he acts on a minor's request for consent. We point out that our answer to question 3 indicates that, before a judge acts on a petition for consent, the minor's parents must be consulted and, therefore, the assumption made

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[10] "4. If the court answers any of question 3 in the affirmative, may the superior court, for good cause shown, enter an order authorizing an abortion, (a), without prior notification to the parents, and (b), without subsequent notification?"

[end of footnote]

in the fourth question is not applicable unless constitutional requirements forbid requiring parental consultation. If they are available, the parents of a minor must be notified of any proceeding brought by her to obtain judicial consent to an abortion and will be entitled to participate. If, however, parental consultation is barred by constitutional considerations in certain instances, perhaps notification of the judicial proceeding will be barred as well. We say that, apart from constitutional restraints, notification to the parents of the judicial proceeding, in advance if possible, is required, and thus we answer question 4 in the negative. We recognize that there may be instances in which the parents are unavailable and the judge must act. In such a case, consultation is impossible, but subsequent

notification of the proceeding may not be. Unless barred by constitutional considerations, notification of a minor's parents concerning the judicial proceedings is required.

5. Procedures for Expeditious Decisions.[11]

The presence or absence of the opportunity for prompt disposition of any judicial proceeding under § 12P is an important consideration in measuring the burden which § 12P places on the minor's constitutional

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[11] "5. Will the Supreme Judicial Court prescribe a set of procedures to implement c. 112, § 12P which will expedite the application, hearing, and decision phases of the superior court proceeding provided thereunder? Appeal?"

[end of footnote]

right to an abortion. Thus, by question 5, the District Court has inquired whether we will prescribe a set of procedures to expedite the application, hearing, and decisional phases of the Superior Court proceeding. We answer question 5 in the affirmative, in the sense that, if the operation of the system requires our involvement by rule or order, we will become involved. We note, however, that the Superior Court has its own rulemaking power, and, in the first instance, we would defer to the judges of that court to determine what, if any, specific rules are needed.

Every court day questions are presented to Superior Court judges which require prompt decision. Section 12P provides just one example of the kind of matter in the Superior Court which calls for early disposition. We are not certain how

far present practices need to be supplemented by specific rules relating to requests for orders under § 12P.

Prompt resolution of a § 12P proceeding may be expected. On any court day, hardly any person in the Commonwealth is more than one or two hours' travel from a court house where a Superior Court judge is available to process an application under § 12P. The proceeding need not be brought in the minor's name and steps may be taken, by impoundment or otherwise, to preserve confidentiality as to the minor and her parents. The judge can issue an order of notice providing for an early hearing. The defendants will be the parents, if they have denied their consent, and, according to the suggestion to us in his brief, if the parents are not available or need not be consulted because of a constitutional bar to consulting them,

the Attorney General will be the appropriate defendant. Section 12P(1) provides that the judge need not appoint a guardian for the minor. If, however, in his discretion, the judge determines to appoint counsel or a guardian ad litem for the minor (a point discussed under question 7), the process need not be long delayed. After determining what representation the minor may need, the question of parental consultation may have to be considered, and finally, perhaps at a somewhat later date depending on the answer to the parental consultation issue, the judge will have to determine whether he should authorize the abortion. At each stage, a record of the proceedings will be preserved. The judge will appreciate the need for an early determination of the issues and the filing of findings of fact. If more is needed to expedite a § 12P proceeding, such as the availability

of application forms for unrepresented minors, we anticipate that the Superior Court, aided by clerks of court and the Attorney General, will take the necessary steps to implement the necessary procedures. If, as we have said, the involvement of this court is required to assure expeditious implementation of § 12P proceedings, we answer the first portion of question 5 in the affirmative.

The second portion of question 5 concerns the prospect of expeditious appeals. We have no question concerning the speedy disposition of any appeal. The case of Doe v. Doe, 365 Mass. 556, 314 N.E.2d 128 (1974) concerning an abortion question, was reported to this court for decision on March 12, 1974, and argued before the full court on March 13, 1974. We entered a dispositive order on March 14, 1974. Although this prompt

disposition may have been facilitated by the fact that the case was entered in the Supreme Judicial Court for the county of Suffolk and promptly reserved and reported for decision by a single justice of this court, we believe that an early hearing and decision on appeal from a judgment of a Superior Court judge may also be achieved. The Appeals Court, to which the appeal would be taken, is in as good a position as this court to provide a prompt hearing and early disposition. A request for direct appellate review by this court might be filed in this court, and, if it were, that request would be acted on promptly. In any event, this court has general superintendence over the lower courts and at any stage may transfer any case to it for disposition or other action, if the need should arise. G.L. c. 211, § 4A.

6. The Relationship of § 12P and G.L. c. 112, § 12F.[12]

The sixth question concerns the differences between (a) the grounds and procedures for showing good cause under § 12P and (b) the standard and procedures contained in G.L. c. 112, § 12F, as appearing in St. 1975, c. 564, which is set forth in the margin.[13]

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[12] "6. To what degree do the standards and procedures set forth in c. 112, § 12F (Stat. 1975, c. 564), authorizing minors to give consent to medical and dental care in specified circumstances, parallel the grounds and procedures for showing good cause under c. 112, § 12P?"

[13] "No physician, dentist or hospital shall be held liable for

(Footnote continued)

(Footnote continued)

[13] damages for failure to obtain consent of a parent, legal guardian, or other person having custody or control of a minor child, or of the spouse of a patient, to emergency examination and treatment, including blood transfusions, when delay in treatment will endanger the life, limb, or mental well-being of the patient.

"Any minor may give consent to his medical or dental care at the time such care is sought if (i) he is married, widowed, divorced; or (ii) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or (iii) he is a member of any of the armed forces; or (iv) she is pregnant or believes herself to be pregnant; or (v) he is living separate and apart

(Footnote continued)

(Footnote continued)

[13] from his parent or legal guardian, and is managing his own financial affairs; or (vi) he reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease.

"Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization.

"Consent given under this section shall be subject to later disaffirmance because of minority. The consent of the parent or legal guardian shall not be required to

(Footnote continued)

(Footnote continued)

[13] authorize such care and, notwithstanding any other provisions of law, such parent or legal guardian shall not be liable for the payment for any care rendered pursuant to this section unless such parent or legal guardian has expressly agreed to pay for such care.

"No physician or dentist, nor any hospital, clinic or infirmary shall be liable, civilly and criminally, for not obtaining the consent of the parent or legal guardian to render medical or dental care to a minor, if, at the time such care was rendered, such person or facility: (i) relied in good faith upon the representations of such minor that he is legally able to consent to such treatment under this section; or (ii) relied in good faith upon the representations of such

(Footnote continued)

(Footnote continued)

[13] minor that he is over eighteen years of age.

"All information and records kept in connection with the medical or dental care of a minor who consents thereto in accordance with this section shall be confidential between the minor and the physician or dentist, and shall not be released except upon the written consent of the minor or a proper judicial order. When the physician or dentist attending a minor reasonably believes the condition of said minor to be so serious that his life or limb is endangered, the physician or dentist shall notify the parents, legal guardian or foster parents of said condition and shall inform the minor of said notification."

[end of footnote]

The 1975 amendment to § 12F, which was characterized above as a limited, statutory mature minor rule, was enacted after the decision of the District Court in this case. Section 12F grants doctors, dentists, and hospitals immunity from liability for damages for failure to obtain parental or similar consent to emergency treatment when delay would endanger the life, limb, or mental well-being of the patient. Section 12F next provides that a minor who is married, widowed, or divorced may consent to medical or dental care, including an abortion or sterilization. Certain other minors, including one who is a parent, is a member of the armed forces, is pregnant or believes herself to be pregnant, or is living apart from his parents and managing his own affairs, are authorized to consent to medical and dental care but not to an abortion or sterilization.

If the physician or dentist reasonably believes that the condition of the minor is so serious that life or limb is endangered, he must notify the minor's parents and advise the minor that he has notified his or her parents.

In the Supreme Court of the United States, the plaintiffs pointed to the new provisions of § 12F and argued that § 12F heightened the discrimination between unmarried minors seeking abortions and minors seeking other medical procedures. The Supreme Court declined to pass on the propriety of any distinction in Massachusetts between abortion and other medical procedures, observing that the constitutionality of any distinction will depend on its degree and the justification for it. Bellotti v. Baird, supra, 428 U.S. at 148-150, 96 S. Ct. at 2867. It concluded that any analysis of the

degree of distinction between consent for abortions and the consent procedures for other medical procedures could not be made until this court defined the nature of the consent required for abortions. Id. at 150, 96 S.Ct. at 2867. The Supreme Court concluded that "it would not be inappropriate for the District Court . . . to certify a question [to this court] concerning the meaning of the new statute, and the extent to which its procedures differ from the procedures that must be followed under § 12P." Id. at 151-152, 96 S. Ct. at 2868.[14]

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[14] The Supreme Court also observed that the claim of impermissible discrimination due to the 1975 statute obviously had not been raised in the District Court, but was "subject to

(Footnote continued)

The grounds for consenting to an abortion under § 12P, which we have defined as the best interests of the minor, are not different from the standards to be applied in determining whether some other medical procedure should be performed on a minor pursuant to § 12F. In each instance, a physician must exercise his or her medical judgment and the minor must consent to the procedure as being in

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(Footnote continued)

[14] inquiry through an amended complaint, or perhaps by other means." Id. at 151, 96 S. Ct. at 2868. We are not informed of any amendment of the District Court complaint. At oral argument counsel for the plaintiffs indicated that the "equal protection" point would be presented subsequently in the District Court.

[end of footnote]

his or her best interests.[15]

The difference between § 12P, concerning an abortion, and § 12F, concerning other medical operations, lies in the procedures which must be followed in arriving at the conclusion that the particular operation will be in the best interests of the minor. Under § 12F, a married, widowed, or divorced minor may consent to any and all medical services without the intervention of either his or her parents or of a court. Thus, the requirements of § 12P concerning parental or judicial approval of an abortion are inapplicable to such

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[15] We put aside in this analysis those minors who are not capable of giving an informed consent. In each case (§ 12F and § 12P), consent may have to be obtained from one or both parents or from a court.

[end of footnote]

minors. All other minors described in § 12F seeking abortions must pursue the procedures of § 12P, although they are free to consent to any other medical procedure (except sterilization) without the involvement of their parents or of a judge. Minors not described in § 12F have only their common law rights to consent to medical services, except as expanded or limited by statute. If these classifications of minors can be sustained against any equal protection challenge advanced by the plaintiffs, no "saving construction" of § 12P (or perhaps of § 12F)[16] will be necessary.

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[16] Statute 1975, c. 564, by which G.L. c. 112, § 12F was amended, does not contain a severability clause as does St.1974, c. 706, amending G.L. c. 112, § 12P. See St.1974, c. 706, § 2.

[end of footnote]

In this court, particularly in oral argument, the plaintiffs have urged that we should declare that the statutory distinction between minors seeking abortions and those seeking other medical services is invidiously discriminatory under art. 10 of the Declaration of Rights of the Constitution of the Commonwealth, our Massachusetts "equal protection" clause. See Opinion of the Justices, 357 Mass. 827, 830, 257 N.E.2d 94 (1970). No question under the Constitution of the Commonwealth has been certified to us. Indeed, none has been raised yet in the District Court. The matter has not been briefed by any party beyond the plaintiffs' truncated argument in the one and one-half pages of their brief which constitute their entire discussion of the sixth question certified to us. We decline to deal with any State constitutional issue in

answering the questions put to us. However, in answering the sixth question we are aware that equal protection of the laws considerations are substantially the same under the State and Federal Constitutions and that, as with other matters we have considered, the interrelationship of § 12P and § 12F (the 1975 statute) must be interpreted so as to avoid constitutional problems as far as possible.

For this reason, in response to question 9, infra _____[C], 360 N.E.2d 302-303, we discuss the possible consequences of a determination that one or more of the classifications made by §§ 12P and 12F are impermissible on Federal equal protection of the law grounds.

[C] Mass. Adv. Sh. (1977) 124-126.

7. Appointment of Counsel for an Indigent Minor.[17]

If a judge of the Superior Court determines that the best interests of an indigent minor would be served by the appointment of counsel to represent the minor, the court has the power to appoint counsel for the minor to assist her in the assertion of her constitutional rights. Section 12P(1) states that the judicial proceeding concerning consent "will not require the appointment of a guardian for the mother." However, § 12P(1) does not forbid the appointment of a guardian ad litem to represent the minor, and thus implies that a judge may make such an appointment. We doubt that the

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[17] "7. May a minor, upon a showing of indigency, have court-appointed counsel?"

[end of footnote]

Legislature intended in all cases that an indigent minor should proceed without counsel in seeking authorization of an abortion, whether she is proceeding in opposition to her parents or in the absence of parental involvement. If the mere existence of the "burden" of seeking judicial consent to an abortion is not unconstitutionally onerous (and apparently these plaintiffs have not yet so claimed in the District Court), the circumstances that an indigent minor may have counsel appointed for her lightens the "burden" and tends to make the requirement more acceptable constitutionally. Even apart from the positive implication of § 12P, a judge of the Superior Court has the power to appoint counsel for an indigent minor

in these circumstances. See G.L. c. 220, § 2.[18]

Although all parties agree on an affirmative answer to question 7, the brief for the Attorney General adverts to the possible argument that a judge may not appoint counsel unless public funds are available for the payment of the reasonable fees of the minor's counsel.[19] If the issue should

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[18] Rule 17(b) of the Massachusetts Rules of Civil Procedure, authorizes a judge to appoint a guardian ad litem to represent a minor in the proceeding before him or to "make such other order as [he] deems proper for the protection of the [minor] . . . ." 365 Mass. 763 (1974).

[19] We hope that significant numbers of competent attorneys would be willing

(Footnote continued)

arise, an obligation to pay the reasonable fees of a minor's attorney might be found even in the absence of an appropriation. See O'Coin's Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 510, 515, 287 N.E.2d 608 (1972); G.L. c. 213, § 8. If a county must pay the cost of court-appointed counsel in a criminal case, regardless of prior appropriation, even where the appointment of counsel may be

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(Footnote continued)

to act without fee in these circumstances and would advise clerks' offices of their willingness to serve so that a list of attorneys could be used in making such appointments. If such is not the case, we do not know that funds have not been appropriated, and will not be appropriated, for expenses of this character.

[end of footnote]

mandated only by court rule and not by constitutional considerations (see Abodeely v. County of Worcester, 352 Mass. 719, 723-724, 227 N.E.2d 486 [1967]), we see no reason to deny counsel for an indigent minor in asserting a constitutional right to an abortion in a State-mandated civil proceeding before a judge of the Superior Court.[20]

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[20] In Payne v. Superior Court of Los Angeles County, 17 Cal.3d 908, 132 Cal.Rptr. 405, 553 P.2d 565 (1976), the Supreme Court of California held (four to three) that, in certain circumstances, an incarcerated, indigent defendant may be entitled constitutionally to the appointment of counsel to handle his defense of a civil action. The court there disclaimed any power to order that

(Footnote continued)

In order to avoid a constitutional question concerning the burden on the assertion of a minor's constitutional rights which would arise from a contrary interpretation, we construe the statutes of the Commonwealth to authorize the appointment of counsel or a guardian ad litem for an indigent minor at public expense, if necessary, if the judge, in his discretion, concludes that the best interests of the minor would be served by such an appointment.

(Footnote continued)

counsel should be paid from public funds. Id. at 920 n. 6, 132 Cal.Rptr. 405, 553 P.2d 565. In the Payne case, the fundamental issue in the underlying civil action did not involve the incarcerated indigent defendant's assertion of a constitutional right.

[end of footnote]

8. The Physician's Reasonable and Good Faith Belief as a Defense.[21]

A physician who believes, reasonably and in good faith, that a minor is eighteen or more years old or has been married, divorced or widowed, although it is not a fact, has a defense to criminal prosecution for performing an abortion on that minor.

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[21] "8. Is it a defense to his criminal prosecution if a physician performs an abortion solely with the minor's own, valid, consent, that he reasonably, and in good faith, though erroneously, believed that she was eighteen or more years old or had been married?"

The word "valid" may not be an appropriate one in the context of the question.

[end of footnote]

We answer question 8 in the affirmative. The fifth paragraph of § 12F, quoted in n. 13 above, provides such a protection to a physician. Although § 12F is not concerned primarily with abortion procedures, the Legislature did not except abortions from the broad grant of protection of the fifth paragraph of that section, as it did exempt abortions from certain other provisions of § 12F. See the third paragraph of § 12F. A construction of § 12F which would not extend to physicians performing abortions the same protection extended to physicians performing other operations would raise a constitutional question which we avoid by the construction of § 12F which we have adopted.

9. Other Comments.[22]

Question 9 invites this court, if it wishes, to make any other comments about § 12P which might assist the District Court in determining whether § 12P infringes the Constitution of the United States. Rule 3:21 of this court, setting forth the certification procedure, contemplates that only questions of law will be certified. Question 9 is not a question of law. However, question 9 presents a practical solution to the problem that there may be questions concerning § 12P which we have not been asked but as to which we have views which might

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[22] "9. Will the Court make any other comments about the statute which, in its opinion, might assist us in determining whether it infringes the United States Constitution?"
[end of footnote]

be instructive to the District Court in this bifurcated, cooperative decision making process. Of course, even if not asked, we might volunteer unsolicited comments on State law which could be largely dispositive of the matter before the District Court.[23]
Thus, as we indicated we would in our answer to question 6, we take this opportunity to comment on the consequences of a determination that the differing procedures of § 12P and § 12F, as interpreted by us apart from

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[23] See Tarr v. Republic Corp., N.H., 352 A.2d 708, 714 (1976), where the Supreme Court of New Hampshire answered an uncertified question and therafter the Federal courts treated that answer as dispositive. See Tarr v. Manchester Ins. Corp., 544 F.2d 14 (1st Cir. 1976).
[end of footnote]

the impact of constitutional considerations, do not survive an equal protection of the laws challenge.

The plaintiffs argue that it is invidious to permit a pregnant minor to consent on her own to any operation, except abortion and sterilization, no matter how serious the operation, as § 12F does on its face, while denying her the right on her own to consent to an abortion, which in most instances (at least in the first trimester) is a relatively minor procedure.[24] The plaintiffs

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[24] The Supreme Court of California has said that a legislative purpose would be irrational if it were "to deny to minors life-saving therapeutic abortions for lack of parental consent while permitting all other pregnancy-related surgical and medical care without the necessity of such

(Footnote continued)

(Footnote continued)

[24] consent." Ballard v. Anderson, 4 Cal.3d 873, 881, 95 Cal.Rptr. 1, 6, 484 P.2d 1345, 1350 (1971)(four to three decision). That court also said (at 883, 95 Cal. Rptr. at 8, 484 P.2d at 1352) that "[t]here is no rational basis for discriminatorily singling out therapeutic abortion as the only type of pregnancy-related surgical care which requires parental consent."

The Supreme Court of Washington has held that statutory distinctions concerning parental consent of the type made by §§ 12F and 12P (but providing a parental veto) do not withstand equal protection scrutiny. State v. Koome, 84 Wash.2d 901, 910, 530 P.2d 260 (1975)(five to four decision). The Court noted the possibility that a requirement of parental consultation might be permissible. Id. at 909, 914, 530 P.2d 260.

[end of footnote]

also challenge the statutory distinction between an unmarried minor and a divorced minor who is given the right to an abortion without parental or judicial consent.

If there is no constitutionally acceptable basis for the legislative distinction between abortions (and sterilization) and other medical procedures, the question will arise as to what the effect of such a determination is on § 12P and § 12F. In that circumstance, § 12F might be construed as applying to all operations, including abortions, in effect eliminating either or both of the parental and judicial consent requirements of § 12P. On the other hand, § 12P might be saved if the scope of § 12F, as it applies to medical procedures for pregnant minors, is construed to apply only to certain medical procedures associated with a determination of pregnancy and

with counseling concerning abortion. The choice, if available constitutionally, is for the Legislature to make, and, of course, it has not done so explicitly. However, we would construe the legislative intent behind the 1975 act (§ 12F) as (a) not favoring an implied repeal of the parental and judicial consent provisions of § 12P and (b) as favoring a restriction on the authorization for consent in § 12F, if necessary to avoid an unconstitutional discrimination, in so far as pregnancy-related operations are concerned.

If the distinction between pregnancy-related operations and other operations cannot withstand an equal protection challenge (and the plaintiffs make no such argument in their brief here), the parental (and judicial) consent provisions of § 12P must fail as far as is necessary to

eliminate the constitutional defect, because we see in § 12F a general legislative intent to eliminate any necessity for parental and judicial consent to operations on minors in the circumstances described in § 12F.

Until the constitutionally unacceptable distinctions, if any, between § 12P and § 12F are defined, we are unable to furnish any further guidance on how § 12P and § 12F should be construed.

CONCLUSION

Apart from the effect of any restrictions which are imposed on the Legislature's regulation of abortions because of constitutional considerations, we answer the principal questions as follows. Parental consultation is required in every instance where an unmarried minor seeks a nonemergency abortion.

If the minor's parents (or their equivalent) are unavailable, parental consultation is not required. In deciding whether to consent to an abortion for their unmarried minor daughter, parents should consider only her best interests. If one or both parents refuse consent, a judge of the Superior Court may authorize an abortion for an unmarried minor if he rules that an abortion is in the minor's best interests. The parents, if available, must be notified of the court proceeding and must be allowed to participate in it. The judge in his discretion may appoint counsel or a guardian ad litem for the minor in the court proceeding. The court proceeding must be handled expeditiously.

A stay of the enforcement of § 12P was entered by a Justice of the Supreme Court on July 30, 1976, and the Justices summarily denied motions to vacate the stay. 429 U.S. 892, 97

S. Ct. 251, 50 L.Ed.2d 175 (1976). By its terms that stay expires when this court renders its decision on the certified questions. In order to give the parties and the District Court an opportunity to consider what, if any, further interlocutory order might be appropriate, the clerk of this court will not transmit an attested copy of this opinion to the clerk of the United States District Court, District of Massachusetts, in answer to the questions certified until twenty days after the receipt by him and by the parties of copies of this opinion from the Reporter of Decisions. Otherwise, the Reporter of Decisions and the clerk of this court are to follow the procedure for transmission of answers which is set forth in Hein-Werner Corp. v. Jackson Indus. Inc., 364 Mass. 523, 530-531, 306 N.E.2d 440 (1974).

So ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.,; and all others similarly situated,
Plaintiffs

v.

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRET BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,
Defendants

JANE HUNERWADEL,
Defendant-Intervenor

Civ. A. No. 74-4992-F

Opinion on Motion for Stay

Feb. 10, 1977

Before ALDRICH, Senior Circuit Judge, JULIAN, Senior District Judge, and FREEDMAN, District Judge.

ALDRICH, Senior Circuit Judge.

To our certification of questions to the Massachusetts Supreme Judicial Court concerning the meaning of, and procedures under, Mass. G.L. c. 112, § 12P, as directed in Bellotti v. Baird, 1976, 428 U.S. 132, 96 S. Ct. 2857, 49 L.Ed.2d 844, the court has made a comprehensive response, Baird v. Attorney General, 1977, Mass., 360 N.E.2d 288. In so doing it has resolved issues of statutory meaning as to which the statute is so uncommunicative on its face that the defendants and intervenor had, in the past, not only disagreed to some extent among themselves, but had

vacillated even in their own views. However, the court has, properly, not ruled on the statute's constitutionality, recognizing that under 28 U.S.C. § 2281, this issue is to be resolved by the federal courts. Plaintiffs seek a stay against the operation of the statute pending that determination. Defendants object, basically, that plaintiffs have not shown a probability of success. They also assert that suspension of the statute will cause irreparable harm to Massachusetts minors.

This last contention hypothesizes the constitutionality of the statute. We do not propose to proceed by assuming the point at issue. We will deal, post, with the separate claim that we should tailor our stay.

With respect to the probability of plaintiffs' success, defendants' refusal to consent to a stay even for briefing - which refusal has, in the

past, led to their immediate application to the Supreme Court - puts us in the position of having to form and articulate our tentative views forthwith. In this we have not been assisted by defendants' assertion in oral argument that, with the exception of the mature minor rule, the Massachusetts court has resolved all issues of statutory construction in accordance with what the Supreme Court indicated might accomplish a constitutional solution. This is not so, as the defendants, when questioned, conceded. In their post-argument brief defendants have modified their contention, now relying for their assertion of constitutionality on their surmise of how the individual Justices felt, based upon deductions they draw from the separate opinions in Planned Parenthood of Central Missouri v. Danforth, 1976, 428 U.S. 52, 96 S. Ct.

2831, 49 L.Ed.2d 788. The surmise is quite unwarranted.[1]

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[1] Defendants' claim, that in Danforth, six of the Justices indicated approval of prior parental consultation, must rest not only on the dissenting opinions, on the parental consent issue, of Justice White, joined by the Chief Justice and Justice Rehnquist, and of Justice Stevens, which defendants quote extensively in their brief, but also on the concurring opinion of Justice Stewart, joined by Justice Powell, which defendants assert is "for present purposes . . . supportive of defendants' position." This last ignores the fact that Justice Stewart, disapproving of an absolute parental veto, states only that parental consultation is desirable "in most cases," expressly referring to the exceptions from the parental consultation requirement which

We believe there should be a stay for three reasons. We say this without, on the one hand, excluding further grounds, and on the other, without suggesting that these views are more than tentative.

First, we are troubled by the fact that the statute does not, in terms, advise parents that all they may consider is the minor's best interest. It would be only natural to read the statute the other way; in fact the defendants, the intervenor, and our dissenting brother, 393 F. Supp. 847, 855, 862, 864, D.C., all did so when the statute was before us initially. The statute will be read

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(footnote cont.)

defendants herein had represented, 428 U.S. 66, 96 S. Ct. 2839, wrongly it turns out, post, to be provided for in the Massachusetts statute.

by parents, and other lay persons, who may not know of, or who may attach no weight to, the Massachusetts court's limitations, and may continue to read it as defendants did originally. This is not an unimportant matter; we have already seen the Massachusetts decision substantially misquoted. Clearly, the freer a parent may feel to refuse consent, the more likely it will be that the minor will have to go to court. To have to go to court, in opposition to her parents' wishes, is a substantial burden on any minor. In this sensative area, anything that needlessly and incorrectly increases the likelihood of this, imposes a burden that is constitutionally impermissible.

Second, in a significant manner the Massachusetts court's interpretation of the statute has not lived up to the possibility envisaged

by the Supreme Court. At 428 U.S. 145, 96 S. Ct. 2865 the Supreme Court said,

> "The picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from

> a statute that creates a 'parental veto'."[2]

The Massachusetts court, however, said just the opposite.

> "Parental consultation is required in every instance where an unmarried minor seeks a nonemergency abortion . . . . The parents, if available, must be notified of the court proceeding and must be allowed to participate in it." Mass., 360 N.E.2d 303.

There is already of record strong reason to believe that in some

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[2] For this the Court apparently relied upon defendants' representations as to the legislature's intent, saying that defendants were in a specially good position to know. 428 U.S. 143, 96 S. Ct. 2864.

instances it would not be to the minor's best interests for her parents to know of her condition. The statute deprives the court of the right to make such a finding. To this extent the state is ruling what is to a minor's best interests, instead of consigning the question to an unfettered tribunal. Thus it has diminished the only feature of the statute that could save it from the Court's ruling in Danforth.

Third. Not only has the Massachusetts court contradicted the claim defendants made to the Supreme Court with respect to a minor's opportunity to show, if that be the case, that it would be to her best interests for her parents not to know of her condition, but it has rejected their further claim that a "mature minor" who is "determined by a court to be capable of giving informed

consent will be allowed to do so."[3] 428 U.S. 144, 96 S. Ct. at 2864. We need not presently reach even a tentative view as to whether this difference constitutes an undue state interference with a minor's constitutional right in the particular application, or improperly discriminates generally between

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[3] The Massachusetts court responded in the affirmative to certified question 2b.

"If the superior court finds that the minor is capable, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision is a better one?" Mass., 360 N.E.2d 293.

abortion and other medical procedures[4] The Supreme Court has, in substance, instructed us to weigh the "degree and the justification" of such limitations. 428 U.S. 150, 96 S. Ct. 2867. This seems our essential task very possibly requiring further evidence. We propose to proceed as promptly as possible, but we do not believe we should be required to do so

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[4] We note for the record that there are two aspects to this: the Massachusetts court's ruling that the statute forbids the application to abortions of what would otherwise be the Massachusetts mature minor rule, and a further question, not previously considered, as to the validity of the exclusion of abortions from Mass. G.L. c. 112, § 12F, as added by Mass. Stat. 1975, c. 564. See 428 U.S. 70-71, 96 S. Ct. 2841-2842; Mass., 360 N.E.2d 288, 296, 297 et seq.

under the pressure of the statute's being operative in the meantime.

Defendants lamented orally, in opposing a stay, that the statute has been on the books for two and a half years, and, except for a brief inadvertent interval, the intent of the legislature has been frustrated for that period. We cannot resist pointing out that defendants, at one time or another, have not only changed their opinion as to what was the legislative intent, but have been twice mistaken. We think that before hurrying to put the legislature's intent into operation it would be well to find out what it is. We make this observation because, in spite of our having abstained in order to have the Massachusetts court instruct us as to the statute's meaning, that court has expressed only its present view, and has added an elastic clause under which the statute will seemingly mean

whatever the Supreme Court determines that, constitutionally, it ought to mean.[5] Although in their brief defendants make no direct reference to this portion of the Massachusetts court's opinion, they do argue that if we feel that the statute is unconstitutional because of some of its terms, we should enjoin the operation only of that portion. We cannot agree. We note, first, that the Massachusetts court's apparent delegation of authority, in effect to

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[5] "If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation." Mass., 360 N.E.2d 288, 292.

reconstrue the statute, is extended only to the Supreme Court. See n.5, ante. Secondly, we note that the Supreme Court's consistent view, most recently expressed in the case at bar, is that a statute may be construed to render it constitutional only when it is "susceptible" to that construction. 428 U.S. 147, 96 S. Ct. 2866. We should have thought that "susceptible" means that the proposed interpretation is one possible meaning of an ambiguous provision. Even there, "[t]he rule of construction to be invoked when constitutional problems lurk in an ambiguous statute does not permit disregard of what [the legislature] commands." United States v. UAW, 1957, 352 U.S. 567, 589, 77 S. Ct. 529, 540, 1 L.Ed.2d 563. The problem may be more complex, but we cannot believe that we have jurisdiction, by way of injunction or otherwise, to direct a state superior court judge to interpret and apply a

state statute in a manner contrary not merely to its "explicit" terms, Mass., 360 N.E.2d 288, 294 but to the present interpretation of the Massachusetts court. Ibid. We must reject defendants' proffer of legislative power.

JULIAN, Senior District Judge (dissenting on motion to stay).

This action was brought as a class action to enjoin as unconstitutional on its face the enforcement of Mass. G.L. c. 112, § 12P. On April 28, 1975, this Court, in a divided decision, declared unconstitutional the parental consent requirement to a minor's abortion and permanently enjoined the enforcement of the statute. Subsequently, on July 1, 1976, the Supreme Court of the United States vacated the judgment of this

Court, holding "that the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of § 12P and the procedure it imposes." Bellotti v. Baird, 428 U.S. 132, 151, 96 S. Ct. 2857, 2868, 49 L.Ed.2d 844, 858 (1976). On July 30, 1976, the Honorable William J. Brennan, acting as Circuit Justice, issued an order temporarily restraining enforcement of the statute pending a final decision by the Supreme Judicial Court of Massachusetts. On January 25, 1977, the Supreme Judicial Court rendered an opinion which comprehensively answered each of the nine questions certified by this Court. In its opinion the Supreme Judicial Court stated that it would wait twenty days before certifying an attested copy of its decision to this Court. Thus the stay previously granted by Justice Brennan

was dissolved on February 14, 1977, when the certified opinion of the Supreme Judicial Court was received by the clerk of this Court.

A preliminary injunction will issue only upon a showing that the plaintiffs have a substantial likelihood of prevailing ultimately on the merits and that, absent the preliminary injunctive relief, the plaintiffs will suffer irreparable harm. The plaintiffs have the burden of proving the existence of both these facts. Automatic Radio Mfg. Co. v. Ford Motor Co., 390 F.2d 113 (1 Cir. 1968), cert. denied, 391 U.S. 914, 88 S. Ct. 1807, 20 L.Ed.2d 653 (1968). The majority, however, shifted the burden to the defendant to prove that a preliminary injunction should not issue. By stating that it refuses to "assume the point in issue," (p. 855 of majority opinion), namely, the constitutionality of the statute, the

majority has in fact assumed that the statute is unconstitutional. The presumption of constitutionality of statutes (Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S. Ct. 1001, 35 L.Ed.2d 351 (1973); McGowan v. Maryland, 366 U.S. 420, 425, 81 S. Ct. 1101, 6 L.Ed.2d 393 (1961); 16 C.J.S. Constitutional Law § 99) applies to Mass. G.L. c. 112, § 12P. The United States Supreme Court in Bellotti v. Baird, 428 U.S. 132, 96 S. Ct. 2857, 49 L.Ed.2d 844 (1976) has vacated this Court's ruling that the statute in question is unconstitutional. The burden of proving that the statute as construed by the Supreme Judicial Court is unconstitutional rests upon the plaintiffs.

The majority relies on three arguments to justify staying the enforcement of Mass. G.L. c. 112, § 12P. First it contends that the

statute is silent regarding the standard to be used by parents in determining whether or not to consent and that Massachusetts parents may be unaware of the Supreme Judicial Court's construction of the statute. This contention is clearly without merit. It is an established rule of law that a state court's interpretation of its own state statutes is binding on the federal courts. See Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass., 426 U.S. 482, 487, 96 S. Ct. 2308, 2312, 49 L.Ed.2d 1, 7 (1976); Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S. Ct. 1881, 44 L.Ed.2d 508 (1975); Kingsley Picture Corp. v. Regents, 360 U.S. 684, 688, 79 S. Ct. 1362, 3 L.Ed.2d 1512 (1959). The majority opinion points out that a "statute may be construed to render it constitutional only when it is 'susceptible' to that construction."

(P. 857 of majority opinion.) This Court, however, is precluded from holding that Mass. G.L. c. 112, § 12P, is not susceptible to a constitutional construction, because the United States Supreme Court itself, in Bellotti v. Baird, supra, expressly found that the statute is susceptible to a constitutional interpretation:

> "It is sufficient that the statute is susceptible to the interpretation offered by appellants, and we so find . . . ."

Id., 428 U.S. at 148, 96 S. Ct. at 2866, 49 L.Ed.2d at 856 (emphasis supplied). The Supreme Court's holding is binding upon this Court.

Furthermore, a state court's construction of its own state statutes is deemed to be notice to all concerned of what the statute provides. See Broadrick v. Oklahoma,

413 U.S. 601, 613, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973) (by implication). It is not essential to the statute's validity or binding force that the standard be spelled out in the text of the statute itself. It is legally sufficient if it is articulated in the opinion of the state's highest court which construes the statute. It is quite clear from the Supreme Judicial Court's answer to question 1 (Baird v. Attorney General, Mass., 360 N.E.2d 288, at 292 n. 4), which was certified by this Court, that the parent when considering whether or not to grant consent is to consider exclusively what will serve the child's best interest.

Furthermore, the Supreme Judicial Court enjoins upon the judges of the Superior Court (Baird v. Attorney General, Mass. 360 N.E.2d 288, page 293) that they must "disregard all parental objections, and other

considerations, which are not based exclusively on what would serve the minor's best interests." Id., at 293. There is no reason to suppose that the Superior Court judges of this Commonwealth would be unaware of the proper standard by which to review a minor's petition under Mass. G.L. c. 112, § 12P.

A second reason relied upon by the majority for granting the stay is that by imposing a mandatory requirement of consultation between the minor and her parents, the Supreme Judicial Court has ". . . diminished the only feature of the statute that could save it from the Court's ruling in Danforth." (P. 856 of majority opinion.) The majority misreads Danforth. In Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L.Ed.2d 788 (1976), the United States Supreme Court struck down the parental consent provision of a

Missouri statute because it purported to delegate an absolute veto power to the parents. The Massachusetts statute as construed does not create any such absolute power. Therefore, it is most unlikely that the Masachusetts statute would be declared unconstitutional for the reasons which invalidated the Missouri statute.

The majority (on pp. 856-857, majority opinion) purports to give a third reason for granting the stay. After several readings of the opinion, however, it is still unclear to me what that third reason might be.

Finally, without considering any of the defendant's contentions that the stay might cause irreparable harm to Massachusetts minors, the majority reaches a finding that absent the preliminary injunctive relief, the plaintiffs would suffer irreparable harm. I fail to see how the enforcement of Mass. G.L. c. 112,

§ 12P, could conceivably result in any harm or injury - irreparable or otherwise - to any of the plaintiffs.

Where is the harm to members of the plaintiff class of Massachusetts minors? If the parents consent to an abortion, as well they might, then no harm would inure to the minor desiring to terminate her pregnancy. If the parents withhold consent but a Superior Court judge determines that an abortion would be in the minor's best interest, then she may have an abortion, and she would suffer no harm. Surely, requiring the minor to comply with minimal legal procedures, though perhaps inconvenient, or even unpleasant, does not constitute irreparable harm or injury to the minor. Only in the instance where the minor's parents and a state judge concur that an abortion would not be in the best interest of the adolescent girl would she be precluded from

having an abortion. Certainly enforcement of a state statute which prevents a minor from undergoing a surgical procedure which is found by both her parents and the Court to be contrary to her own best interests, cannot sensibly be said to cause her irreparable harm.

Where is the harm to Baird or to Dr. Zupnick? Baird's only conceivable harm is a possible diminution of income which might result from the loss of business of some minors who forego having abortions, or who decide under parental guidance to have the operation at a facility other than Baird's. The only harm which can possibly inure to Dr. Zupnick would similarly entail only a loss of income. These financial losses, which would certainly not be ruinous to Baird's business or to Dr. Zupnick's professional career, cannot be considered irreparable.

On the contrary, the harm that is inflicted on the minor and her parents by staying the enforcement of Mass. G.L. c. 112, § 12P, is permanent and grave. A pregnant unmarried minor is likely to be in an emotional turmoil:

> "All experts agreed that pregnancy in an unmarried minor is a period of great emotional stress; . . ."

Baird v. Bellotti, 393 F. Supp. 847, 853 (D. Mass. 1975) (Aldrich, J.). She may well be confused and unable to decide what to do.

> "We find quite credible defendants' expert who testified that at certain periods of their lives adolescents might react maturely one day and immaturely the next."

Id., at 854, n. 9.

It is undisputed that she would profit from parental support and

guidance at this critical juncture in her life.

> "All experts agreed that . . . support is needed, and that parental support, if forthcoming, is most desirable. Probably most parents are supportive."

Id., at 853.

Yet, by staying the enforcement of this statute, a Massachusetts minor who has an abortion without consulting with her parents will be deprived of the counsel, guidance and support which her parents could have provided for her at a critical period in her life and to which she is entitled as a matter of state law. She may be left without guidance to choose among a variety of abortion facilities, unregulated and unsupervised by public or other independent authority.

> "The greatest divergence in the testimony related to the capacity of minors to given [sic] an informed consent. At one extreme, Baird testified that in his many years experience he had never met a minor who was incapable, a conclusion supportable only on a hypothesis, which we reject, that an abortion, if not medically contra-indicated, is always the best solution, so that a minor who wants one must be presumed capable."

Id., at 854. (Footnotes omitted.)

Corresponding to the child's need for parental protection and guidance, the parents have a

legal[1] and moral obligation to provide for and protect their child. As the majority finds in their earlier opinion, most parents would wish to know of their child's condition, so that they could discharge their parental obligations.

> ". . . From the standpoint of parents, we believe that most would wish to know of their daughter's pregnancy, and we may assume that most would seek to be supportive."

Id., at 853.

Yet, by staying the enforcement of this statute, information of their child's condition may be kept from them, and they may be deprived

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[1] See laws both decisional and statutory cited in fn. 17, Baird v. Bellotti, 393 F. Supp. 847, 864 (dissenting opinion).

permanently of the opportunity of fulfilling, for the benefit of their minor daughter, the parental obligations which they owe her.

The action of this Court staying the enforcement of Mass. G.L. c. 112, § 12P, removes for an indefinite period the only legal barrier in this state against the exploitation of pregnant adolescents by operators of unregulated and unsupervised abortion facilities who may be motivated by concerns which are far removed from the minor's own best interest. The stay granted by the majority is legally unjustified and does not serve the best interest of either the minor or the public.

I respectfully dissent.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM BAIRD; MARY MOE;
PARENTS AID SOCIETY, INC.;
GERALD ZUPNICK, M.D.; and all
others similarly situated,
Plaintiffs,

v.

FRANCIS X. BELLOTTI, Attorney General
of the Commonwealth of Massachusetts;
GARRETT BYRNE, District Attorney of the
County of Suffolk; the District Attorneys
for all other Counties, their agents, successors,
those acting in concert with them, and all others
similarly situated,
Defendants,

JANE HUNERWADEL,
Defendant-Intervenor.

CIVIL ACTION
No. 74-4992-F

Opinion.

May 2, 1978.

Before ALDRICH, *Senior Circuit Judge*, JULIAN, *Senior District Judge*, and FREEDMAN, *District Judge*.

ALDRICH, *Senior Circuit Judge*.

INTRODUCTION

This is the third time that this class action involving the constitutionality of a Massachusetts statute defining procedures that must be followed before a minor can obtain an abortion,[1] has required a full opinion.[2] It has been extensively prepared and briefed. Defendants[3] commence their most recent brief with this statement.

> "With the exception of the Watergate scandal and the Viet Nam war, no issue has divided the country and its

[1] The entire statute has been printed in other opinions. The section presently pertinent is Mass. G.L. c. 112, § 12S.

> "(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.
>
> "If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient."

[2] For our prior opinions enjoining the statute's operation, *see Baird* v. *Bellotti*, D.Mass. 1975, 393 F.Supp. 847, (*Baird I*,) *Baird* v. *Bellotti*, D.Mass., 1977, 428 F.Supp. 854, (*Baird II*.) *Baird I* contains many basic facts, including identification of the plaintiffs, standing, and justiciability, not repeated herein.

[3] Defendants are Francis X. Bellotti, Attorney General of the Commonwealth, and the District Attorneys of the several Massachusetts counties. Jane Hunerwadel, mother of minor daughters, was permitted to intervene as the representative of parents of Massachusetts minors who might wish to obtain abortions without parental knowledge or consent. In addition, we accepted Planned Parenthood League of Massachusetts, Crittenden Hastings Clinic, and Preterm, in a status something more than amici because of reservations about the adequacy of plaintiffs' representation.

> governmental officials more dramatically than the debate over the propriety of physicians' performing procedures to induce the termination of pregnancies, or as they are commonly referred to, abortions. The sparks of this controversy have fallen on all levels of government and flamed into judicial conflagrations involving additional and difficult issues of federalism, the legal process, and the relations among the state, the family, and the family's individual members."

Although we might question how far the Watergate scandal divided the country, and we are unaware of any body of judicial disagreements warranting the description of conflagrations, we agree with the rest of this statement. We do not construe it as an admonition directed to our personal conduct. However, we do accept it as a guide for ourselves in choosing the path we should tread. At the same time, we believe that the Massachusetts legislature should govern itself with the same understanding. When dealing with relatively unimportant and uncontroversial matters the state can paint with a broad brush. When entering an area of highly cherished rights and principles, where the sparks, to use defendants' word, are charged because of basic, conflicting and deeply held beliefs, the state should proceed with corresponding care. We do not find that it has done so. Nor do we agree with defendants that this is a case of parties seeking relief for overbreadth improperly affecting others, not before the court. *Cf. Young* v. *American Mini Theatres, Inc.*, 1976, 427 U.S. 50, 59; *Broadrick* v. *Oklahoma*, 1973, 413 U.S. 601. Plaintiffs are asserting defects in their own right.

The first question is what the statute means. Basically, it requires a minor under 18, unless married, widowed or divorced, who desires an abortion, to obtain the written consent

of both parents, unless available, and failing that, the approval of a judge of the superior court, upon a finding of "good cause." Although there are some additional questions, there were three principal areas of disagreement as to the more precise statutory meaning; the right of parents, in withholding consent, to consider interests other than the minor's, *i.e.*, their own, and that of the family as a whole (parents' rights); the power of the court to order an abortion without the parents' knowledge in appropriate instances (parents' bypass); the power of the court to override the informed consent of a mature minor (judicial override). At the original hearing defendants and all members of the court agreed that the statute recognized parents rights as well as the minor's, and forbade any parent bypass. Our dissenting brother felt, mistakenly, as it turned out, that the informed consent of a mature minor could not be overridden by the superior court. The court majority considered the statute unconstitutional in any event, and rejected his suggestion that we refer its meaning to the Massachusetts Supreme Judicial Court.

On appeal to the Supreme Court defendants changed their position in a number of respects. They abandoned parents' rights; they asserted that parents must regard only the minor's interests in considering whether to consent, and asserted, further, that the statute permitted court proceedings without the parents' knowledge if in the minor's best interests. Finally, they agreed with our dissenting brother that the statute recognized the mature minor rule and that there could be no judicial override in such event. The Supreme Court, without reaching the constitutional questions, but on the basis of the Massachusetts Attorney General's interpretation, which, it said, deserved special consideration, 428 U.S. at 143, stated that, so read, the Massachusetts statute might differ fundamentally from the Missouri statute struck down in *Planned Parenthood of Central Missouri* v. *Danforth*, 1976, 428 U.S. 52. Accord-

ingly, it instructed us to refer the matter of construction to the Massachusetts court. *Bellotti* v. *Baird*, 1976, 428 U.S. 132.

Hypothesizing the interpretation that defendants urged upon it, the Surpeme Court said,

> "The picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from a statute that creates a 'parental veto.'" 428 U.S. at 145.[4]

In other words, the Court envisaged a mature minor rule, with no power in the superior court to override, and which permitted parents' bypass altogether if the court found an informed consent, and even as to an immature minor if the court found that an abortion without her parents' knowledge would be in her best interests.

Pursuant to our instructions, we certified nine questions to the Massachusetts court and, in the meantime, continued the stay of the statute's enforcement. *Baird II*. Thereafter we received our answers. *Baird* v. *Attorney General*, 1977 Mass. A. 3. 96, 360 N.E.2d 288. The Massachusetts court there rejected the concept of parents' rights, holding the parents may consider only the minor's personal interests in deciding whether to consent. However, the court also construed the statute to be in some respects radically different from that envisaged by the Supreme Court. The court held that there could be no parents' bypass in any case. Further, it held that the statute eliminated abortions altogether from the mature minor rule. We address the constitutional issues raised by those holdings in that order.

1. *Parents' Bypass*: *The statute's absolute requirement of parental notification*.

The Massachusetts court determined that the legislature was "explicit in stating that a judge should pass on an application for a consent order only after one or both parents have declined to consent to the abortion." 360 N.E.2d at 294. Faced with the loss of this alleviating feature, defendants now take the position that there are not enough cases calling for an exception to mandatory consultations.[5]

Defendants commence with a number of mistaken assumptions. In the first place, they apparently misread the language of the Supreme Court's opinion, quoted ante, and think the Court was contemplating parents' bypass only when there was affirmative proof that this would be in the minor's best interests. We read the Court's language as indicating it understood defendants' contention to be that bypass would be

[4] In referring to *Baird* in *Maher* v. *Roe*, 1977, 432 U.S. 464, 473, the Court omitted part of the material in this paragraph. Defendants contend that by so doing the Court has limited the *Baird* decision and, consequently, the issues before us. We cannot think *Baird* was intended to be overruled or modified by an abbreviated summary, and we mention this point only because of the stress defendants lay upon it.

[5] Alternatively, defendants contend that "the proper decision would determine that the statute is valid on its face and leave for individual or aggregate 'as applied' litigation the resolution of problems affecting individual 'mature minors.'" We regard this argument as specious. Unless we act, the statute will have to be "applied" by the superior court as the Massachusetts court has held it is to be applied, *viz.*, by refusing to take jurisdiction until the parents have been notified.

in order in every case that the superior court found informed consent by a mature minor. The evidence warrants our findings that many, perhaps a large majority of 17-year olds are capable of informed consent, as are a not insubstantial number of 16-year olds, and some even younger.

In addition, the Court recognized that even if incapable of informed consent, it may be to a minor's best interest that the hearing be held, and the abortion be performed, without her parents' knowledge. The immature minor may be, in fact, the least capable of dealing with a hostile family situation. We reject defendants' singular contention that the issue of immature minors is not before us.[6]

Finally, in an apparent attempt to minimize the importance of the statute's defects, defendants' post-trial brief contains a graphic diagram prepared by counsel, divided into trimesters, and again subdivided, from which they conclude that plaintiffs' total complaint relates to only "one-twenty-fourth of the situations which the statute encompasses." Not only does this fractionalization disregard the points just made, but it overlooks the fact that a minor's possible need of an abortion without her parents' knowledge is not limited to the first trimester. However, even were the issues confined to the first trimester, the great majority of abortions occur in the earlier months. Defendants' giving equal numerical weight to each trimester is fanciful.

Coming to the merits, and passing for the moment the separate issue of mature minors, there are a variety of recognized reasons why it would be to a minor's best interests for

[6]Defendants also contend that plaintiffs waived the subject of immature minors. It is not clear that they did so, but, if they did, it was a breach of their duty as representatives of the classes that at least Dr. Zupnick purported to represent, and we are not bound thereby. It was for such reasons that we gave special stature to the parties we would ordinarily have considered only amici.

one or both of her parents to be kept in ignorance of her pregnancy. Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. Defendants concede, and the evidence shows, that an appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or on continuance of the pregnancy as punishment. We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court. This would seem but a normal reaction of persons who hold strong anti-abortion convictions.

The Massachusetts court conceded that there is no penalty for improperly withheld consent. From the parents' standpoint, the court was correct, but from the minor's manifestly it is not. We begin with the testimony of defendants' expert that a substantial number of minors would refuse to consult with their parents under any circumstances. Assuming, however, that they did consult and that the parents improperly refused to consent, the penalty borne by the minor — the burden of seeking a court order — is a heavy one. Plaintiffs' expert credibly and without contradiction testified that court proceedings over such a personal matter, even if conducted in the most benign manner, would be "severely detrimental to a teenager, particularly since she had just met with her parents' disapproval, which is difficult enough." Further, she credibly testified that many minors would not go to court, especially if it had to be against her parents, but rather would resort to illegal and frequently dangerous abortions. But assuming again in the statute's favor that the minor would initiate the proceedings, defendants' own expert expressed the opinion that if she did go to court and was successful, it would be likely

to destroy what was left of the family relationship.[7] The minor, accordingly, is in a no-win situation. If she loses the judicial proceedings, it will be a personal blow, and scarcely a redemption of the ill feeling and tension that undoubtedly resulted from her parents' refusal of consent and her taking them to court. If she wins, according to defendants' own expert she is likely to find herself in an even worse position.

On this basis plaintiffs contend with some persuasiveness that the entire concept of a court proceeding to remedy the unconstitutionality of the parental veto, as struck down in *Danforth*, is but an ignis fatuus, and itself imposes too great a burden upon the exercise of the minor's rights. We do not reach this issue, but we do hold that it is an improper burden in those cases where a court, if given free rein, would find that it was to the minor's best interests that one or both of her parents not be informed, but is forbidden by the statute to make this decision. In remanding the case to us the Supreme Court said,

> "We do not accept appellees' assertion that the Supreme Judicial Court of Massachusetts inevitably will interpret the statute as to . . . require the superior court to act other than in the best interests of the minor . . . ." 428 U.S. at 147.

However, in reading the statute as requiring parental notification in every instance, the Massachusetts court has done precisely that.

Defendants would answer this by claiming that this defect is not "real and substantial," *Young* v. *American Mini Theatres, Inc.*, ante, 427 U.S. at 60, or "substantial . . . in relation to the statute's plainly legitimate sweep," *Broadrick* v. *Oklahoma*, ante, 413 U.S. at 615. However, in another connection, but equally applicable here, their brief refers to "legislative recognition of the unfortunate fact that parents are not always supportive of their pregnant daughters and may, the evidence suggests infrequently, refuse to consent to the performance of abortion surgery although the surgery is in their child's best interests, or mistreat her in other ways." If there is legislative recognition of this unfortunate fact in one connection, there is no reason why there should not be in another. In terms of the direct concern of this statute, the exact number of minors who are injured is unimportant. Particularly is this so when there is no practical reason for not protecting them. Practicality, in some cases, may justify overbreadth, but since, under the Massachusetts court's holding, the superior court in any event must determine the minor's best interests in the light of all her personal circumstances, it opens no new areas to inquire into her family situation.

We add that it is peculiarly incorrect, and inappropriate, for defendants to express alarm by saying that "plaintiffs' overbreadth claim is an unwarranted use of an engine of destruc-

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[7] "It seems to me that when affairs have reached this point where the relationship between the parents and the child have become a courtroom issue that I would have a lot of misgivings about the validity of the relationship between the parents and the child and how capable they are of being valid support for this child in the future.

. . . . . .

"The consequences, if the decision was made in favor of the child, for quality family relationships are not good. The need for support on the part of the child would be abandoned at this point and the child would be abandoned at this point and her need for support would be great . . . ."

This last sentence may have been inartistically expressed, or inaccurately transcribed, but, however it was said, we reject defendants' contention that their witness made "clear it is not judicial intervention but rather the underlying family crisis which prompts his dim prognosis." To the contrary, it is apparent that he felt a judicial proceeding, particularly if successful, might be the final blow.

tion whose acceptance would destroy the entire statute." If the statute is overbroad because it fails to protect the interests which are its sole justification, there is a simple solution — the legislature can remedy the defect.

We cannot leave this matter without commenting briefly on the superlatives that intervenor Hunerwadel attached to the value of requiring parental notification in order to obtain parental support, and to permit parental guidance. We in no way minimize the importance of these matters.[8] Parents have many years, however, to offer guidance, and to indicate support. However surprised an individual parent may be to find a daughter pregnant, given the present high incidence of teenage pregnancy the possibility seems too great for concerned parents to disregard until it happens. If the family relationship is such that communication has not been attempted, or successful, before the pregnancy, we agree with the expert who doubted the efficacy of a last-minute, state-compelled consultation. What is more important, if the minor, too, doubts it, a statute that requires her to go to her parents as a precondition to going to court will not tie her hands. Rather, it will lead her to the illegal abortionists that defendants rightly decry, or to other dangerous activity. The minor may, of course, be mistaken, but we do not believe the answer to this is a judicial proceeding preconditioned on her finding out, for the die has then been cast.

[8] We also note that Justice White's opinion in *Danforth* referred to parental consent as "the traditional way by which States have sought to protect children from their own immature and improvident decisions." 428 U.S. at 95. The Justice was speaking, however, in terms of a statute under which parents made the final decision. Where there is to be a judicial determination, it would be counter-productive to include the parents when the court finds that their knowledge and presence would be detrimental.

2. *Judicial Override: The mature minor and unequal protection.*

Not only under this statute must every minor, irrespective of her achievement of maturity sufficient to reach an informed consent, notify her parents and seek their consent before going to court, but she must submit to the court's decision if it does not conform to her own. Defendants represented to the Supreme Court that Massachusetts recognized the mature minor rule and that if the court found an informed consent, it would proceed to issue the order. The Massachusetts court held that defendants had misread the statute; that Massachusetts did have the mature minor rule, but that the statute rejected it with respect to abortions. It went on to state that, but for the statute, the mature minor rule would permit an informed consent "where the best interests of a minor will be served by not notifying . . . her parents." 360 N.E.2d at 296. Thus the statute not only requires the parents to be notified, but deprives the minor of the right to decide even when the court has found her mature and that her decision was informed. Instead, the state, acting through the judge, substitutes its own view. It does so even in light of the testimony, which we credit, that in addition to the loss of her rights, it is a highly traumatic experience for a mature minor to be refused a desired abortion.

A minor has a basic constitutional right to an abortion. *Roe* v. *Wade*, ante; *Carey* v. *Population Services International*, 1977, 431 U.S. 678, 692-94; *Planned Parenthood of Central Missouri* v. *Danforth*, ante, 428 U.S. at 74-75. The state's power to limit this right should extend only to protect the minor from the special consequences of her minority — immaturity, and the lack of informed understanding. Instead, the statute imposes upon the minor the very disability which has been found not to exist, and does so uniquely in the area in which the Court has determined she has constitutional rights.

An account of the Massachusetts law as to mature minors is fully set forth in the opinion of the Massachusetts court, and need not be repeated. Except for sterilization, a far more serious and far-reaching procedure, abortion is the only form of surgery to which a mature minor may not consent, although the evidence shows that many other forms are far more complicated and dangerous. Defendants, in dwelling upon the dangers of abortion, proceed as if the only issue were to abort or not to abort, neglecting the fact that the choice necessarily involves a further alternative. The evidence fully supports the conclusion stated in *Roe* v. *Wade*, ante, 410 U.S. at 149, that continued pregnancy and child-birth involve greater risks than a properly performed first trimester abortion. Nor are we speaking only as to physical dangers. The same comparative findings with respect to abortion as against continued pregnancy apply to the psychological risks as to the physical. We find no reasonable basis for Massachusetts distinguishing between a minor and an adult, given a finding of maturity and informed consent.[9] Even the Massachusetts court stated that this is an area particularly appropriate for the mature minor rule. 360 N.E.2d at 296. We regard the legislative exception to be both an undue burden in the due process sense, and a discriminatory denial of equal protection.

3. *Formal overbreadth.*

Not only has the statute, with the exception of parents' rights, been found to possess none of the features which defendants persuaded the Court might distinguish it from the Missouri statute condemned in *Danforth*, but we believe it improperly suggests the existence of parents' rights. Defendants,

[9]Nor, parenthetically, has any reason been advanced for attaching to abortion the special requirement of dual consent by both parents. Rather, this provision seems a further manifestation of our originally found intent to recognize parents' rights.

realizing that extending rights to parents that may conflict with a minor's own interest was improper under *Roe* v. *Wade*, abandoned the position that the statute recognized them in their arguments before the Supreme Court and the Massachusetts court, and the latter, pursuant to the need to construe the statute constitutionally, accepted that construction. We agree with our dissenting brother that, generally, a limiting construction of an otherwise unconstitutional state statute by a state court is read into the statute, and can save it, if the construction itself is constitutional. In this case, however, involving as it does a most sensitive area, where the statute will be read, and applied, primarily by laymen, we think that a limiting judicial construction is insufficient to cure the impermissible chill which its excessively broad language creates. It is only reasonable to anticipate that many parents, accustomed to think in terms of parents' rights, will find them included for the very reasons originally argued by the defendants and accepted by us. Clearly they will do so if they are unaware of the limitations which the court read into the statute. We do not share our brother's optimism that every parent who knows of the statute will be equally cognizant of the court's interpretation. Such knowledge is a legal presumption, not a factual one. Moreover, it is likely that some, even if aware of the court's opinion, will choose the language of the legislature over judicial limitations they regard as an unwarranted usurpation. We may take judicial notice, from public reaction we have seen to *Roe* v. *Wade*, that an appreciable segment of the public holds such views.

In light of the very heavy burden that the statutorily required judicial proceeding imposes upon a minor, we regard it essential that the limited scope of the issue confronting parents, when considering whether to consent, be brought home as forcefully, and precisely, as possible, to minimize the incidence of improper refusals. Since there is no justification

for the statute's failure to do this, the shadow it casts is an undue burden upon the minor's rights. *See Maher* v. *Roe*, ante, 432 U.S. at 473; *Bellotti* v. *Baird*, ante, 428 U.S. at 147. Arguably, it is a welcomed shadow. Whatever may have been the legislature's original intent, we observe that it reenacted the statute, without amendment, in 1977 Mass. Acts ch. 397, not only after the Supreme Court had indicated what might pass constitutional muster, but after the Massachusetts court had disclosed this apparent overbreadth, and we had commented, in *Baird II*, on its chilling effect. The statute is a prominent public issue, and we cannot think the legislature was unaware of its judicial course. Under these circumstances it may be thought that the legislature prefers the chilling effect rather than to have the statute expressed in "terms that the ordinary person exercising ordinary common sense can sufficiently understand." *United States Civil Service Commission* v. *National Ass'n of Letter Carriers*, 1973, 413 U.S. 548, 569. This, in turn, evokes the statement of the Court in *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 1977, 429 U.S. 252, 265-66, "When there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified." This response seems particularly warranted when the overbreadth serves no other purpose.

JUDICIAL REPAIR.

The Massachusetts court, although recognizing that its function was to construe the statute and not to determine its constitutionality, did read a substantial limitation into a portion of the language in an effort to make the parental consent provision constitutional. The court did not, however, read into the statute the exceptions the Supreme Court had indi-

cated would make a fundamental difference and might save it from constitutional infirmity. Instead, in these respects it read the statute the other way, but purported to give it a chameleon-like ability to adjust to whatever color should ultimately be necessary to protect it. While saying that the statute "is explicit in stating that a judge should pass on an application . . . only after one or both parents have declined to consent," 360 N.E.2d at 294, nonetheless this requirement is subject to alteration.

> "If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation." *Id.* at 292.
>
> . . . . . .
>
> "[The statute] must be construed to require as much parental consultation as is permissible constitutionally. In such a situation, the judge will have to determine whether circumstances exist which make prior parental consultation impermissible constitutionally." *Id.* at 294-95.

How the judge is to have the opportunity to make such a determination, much less how a minor seeking an order will know he can do so, in the face of explicit language saying he cannot, the court did not explain.

Again, the court said,

> "The Legislature has left no room to apply a mature minor rule where an unmarried minor seeks an abortion without parental consultation." *Id.* at 294.

However, this, too, can be changed, "[if] a contrary conclusion is compelled constitutionally." *Id.* at 293.

This perceived adaptability presents a number of problems. It is commonly said that a statute is to be given a constitutional construction "if fairly possible," *Crowell* v. *Benson*, 1932, 285 U.S. 22, 62, "when a limiting construction . . . could be placed," *Broadrick* v. *Oklahoma*, ante, 413 U.S. at 613. Here something more is involved than construing language. The Massachusetts court, in addition to contradicting its specific terms, suggests reading into the statute affirmative provisions made out of nothing but a generally announced purpose to pass constitutional muster.[10] In so doing, the court seems to have found the ultimate remedy for all constitutional infirmities. If a statute which, in terms, requires parental consultation without exception, can be "construed to require as much parental consultation as is permissible constitutionally," here, at once, is an instant cure, both for overbreadth, and for lack of standards. Regardless of whether a statute says too much, or too little, so long as the legislature intended it to be constitutional, when it comes before a court it will be appropriately rewritten. With due respect, we cannot believe this to be possible. *Cf. United States* v. *Reese*, 1875, 92 U.S. 214, 221.

The situation is even more undesirable. Although the statute is not ours, the Massachusetts court has, in effect, given us the coloring-book. The Supreme Court remanded the case for construction by the Massachusetts court because "in the absence of an authoritative construction, it is impossible to define precisely the constitutional question presented." 428 U.S. at 148. Now, apparently, the question supplies the answers. This is an approach which, so far as we can ascertain, is

[10] Although the Massachusetts court, and the defendants, speak of severability, such action is not severance. Severability is a process of striking out, not of insertion or rewriting. *See United States* v. *Reese*, 1875, 92 U.S. 214, 221.

unique. While it is ultimately, of course, for the Supreme Court, we must doubt our authority to fix terms of a state statute contrary to the prima facie interpretation given it by the state court. *See United States* v. *Thirty-seven Photographs*, 1971, 402 U.S. 363, 369.

We reaffirm our decision that the statute is unconstitutional and is to be permanently enjoined. Plaintiffs are entitled to costs, including recovery of costs paid as a result of the previous appeal, lost because of defendants' mistaken advocacy.

BAILEY ALDRICH,
U.S. Circuit Judge.

FRANK H. FREEDMAN,
U.S. District Judge.

JULIAN, Senior District Judge (dissenting):

After the first trial the majority of this three-judge court held Mass. G.L. c. 112, § 12P unconstitutional because of its requirement of parental consent to a minor's abortion and permanently enjoined the defendants from enforcing it "in any fashion."

I dissented. The majority and dissenting opinions are reported in 393 F.Supp. 847, at pages 849 and 857 respectively.

The defendants appealed. The Supreme Court vacated the judgment of the District Court and remanded the cases[1] for proceedings consistent with the Supreme Court's opinion holding that the District Court should have certified to the Supreme Judicial Court of Massachusetts (hereinafter SJC) ap-

[1] *Bellotti* v. *Baird*, No. 75-73, together with the companion case, *Hunerwadel* v. *Baird*, No. 75-109; 428 U.S. 132 (1976).

propriate questions concerning the meaning of section 12P and the procedure it imposes.

The District Court accordingly certified nine questions to the SJC which, after hearing arguments of counsel, answered all nine questions in an opinion filed January 25, 1977. *Baird* v. *Attorney General*, ____ Mass. ____, 360 N.E.2d 288.

This District Court thereafter held further hearings and received additional evidence, arguments and briefs in the case.

The District Court remains divided on the issue of the constitutionality of the statute as construed by the SJC in its answers to this Court's questions. The same two judges who had invalidated the statute have now reaffirmed their original decision and have held that section 12P (now section 12S) even as construed by the SJC is unconstitutional and ordered that enforcement of the statute be permanently enjoined.

I again dissent from their decision. I would hold the statute constitutionally valid except that part which as construed by the SJC in its answer to question 2(b) vests in the superior court judge the power to withhold consent to the abortion even though he finds that the minor "is capable of making, and has made, an informed and reasonable decision to have an abortion" but further "determines that the best interests of the minor will not be served by an abortion." *Id.*, at 293.

In 1974 the Massachusetts Legislature adopted Stat. 1974, c. 706, entitled, "An Act to protect unborn children and maternal health within present constitutional limits." Section 12P of that Act reads as follows:

> "(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a

hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient."

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section 12R."

The nine questions certified to the SJC and its answers are as follows:

> "1. What standards, if any, does the statute establish for a parent to apply when considering whether or not to grant consent?
>
> "a) Is the parent to consider 'exclusively . . . what will serve the child's best interest'?
>
> "b) If the parent is not limited to considering exclusively the minor's best interests, can the parent take into consideration the 'long-term consequences to the family and her parents' marriage relationship'?
>
> "c) Other?"

The SJC gave this answer (360 N.E.2d at p. 292):

> "This question concerns the standard which should be applied by a parent in deciding whether to consent to an abortion for his or her unmarried daughter. The statute provides no explicit standard. . . . In light of the Court's opinion in *Planned Parenthood of Cent. Mo.* v. *Danforth* [428 U.S. 52 (1976)] abrogating an absolute parental veto, we construe § 12P so as to avoid any constitutional question, as far as possible, and answer that the parent is to consider 'exclusively . . . what will serve the child's best interest.' We thus answer question 1(a) in the affirmative and need not answer questions 1(b) and 1(c)."

"2. What standard or standards is the superior court to apply?

"a) Is the superior court to disregard all parental objections that are not based exclusively on what would serve the minor's best interests?

"b) If the superior court finds that the minor is capable, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision is a better one?

"c) Other?"

The SJC answered as follows (360 N.E.2d at page 293):

> "Section 12P provides that if one or both of the minor's parents refuse consent, 'consent may be obtained by order of a judge of the superior court for good cause shown . . . .' Here there is a statutory standard of 'good cause.' The second question inquires concerning the role of the judge in applying the 'good cause' standard. We think it clear, answering question 2(a), that the same considerations referred to in answering question 1 must be applied by a judge of the Superior Court. He must disregard all parental objections, and other considerations, which are not based exclusively on what would serve the minor's best interests. . . . '[G]ood cause' means that the judge may give consent to an abortion where it is shown that, in spite of the disapproval of one or both parents, the best interests of the minor will be served if the abortion is performed. In granting consent, the judge, of course, may impose reasonable conditions which will protect those best interests."

Answering question 2(b), the SJC stated:

> "Unless a contrary conclusion is compelled constitutionally, we do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge must make a determination of those circumstances, but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him. We suspect that the judge will give great weight to the minor's determination, if informed and reasonable, but in circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact."

"3. Does Massachusetts law permit a minor (a) 'capable of giving informed consent,' or (b) 'incapable of giving informed consent,' 'to obtain [a court] order without parental consultation'?"

The SJC answered (360 N.E.2d at 296) that

"parental consultation for an abortion is required by statute in all cases, other than in an emergency or where there is no parent (or the equivalent) available."

"4. If the court answers any of question 3 in the affirmative, may the superior court, for good cause shown, enter an order authorizing an abortion, (a), without prior notification to the parents, and (b), without subsequent notification?"

The SJC answered (360 N.E.2d at 297) that

"if they are available, the parents of a minor must be notified of any proceeding brought by her to obtain judicial consent to an abortion and will be entitled to participate . . . . We say that, apart from constitutional restraints, notification to the parents of the judicial proceeding, in advance if possible, is required, and thus we answer question 4 in the negative. We recognize that there may be instances in which the parents are unavailable and the judge must act. In such a case, consultation is impossible, but subsequent notification of the proceeding may not be. Unless barred by constitutional considerations, notification of a minor's parents concerning judicial proceedings is required."

"5. Will the Supreme Judicial Court prescribe a set of procedures to implement c. 112, § 12P which will expedite the application, hearing, and decision phases of the superior court proceeding provided thereunder? Appeal?"

The SJC answers the first portion of question 5 in the affirmative (360 N.E.2d at pp. 297-298):

"Prompt resolution of a § 12P proceeding may be expected. On any court day, hardly any person in the Commonwealth [of Mass.] is more than one or two hours' travel from a court house where a Superior Court judge is available to process an application under § 12P. The proceeding need not be brought in the minor's name and steps may be taken, by impoundment or otherwise, to preserve confidentiality as to the minor and her parents."

The SJC details the procedures available to expedite the proceedings:

"At each stage, a record of the proceedings will be preserved."

With reference to the second portion of question 5, which concerns the prospect of expeditious appeals, the SJC states that it had

"no question concerning the speedy disposition of any appeal."

"6. To what degree do the standards and procedures set forth in c. 112, § 12F (Stat. 1975, c. 564), authorizing minors to give consent to medical and dental care in specified circumstances, parallel the grounds and procedures for showing good cause under c. 112, § 12P?"

The SJC answered as follows (360 N.E.2d at p. 300):

"The grounds for consenting to an abortion under § 12P, which we have defined as the best interests of the minor, are not different from the standards to be applied in determining whether some other medical procedure should be performed on a minor pursuant to § 12F. In each instance, a physician must exercise his or her medical judgment and the minor must consent to the procedure as being in his or her best interests. The difference between § 12P, concerning an abortion, and § 12F, concerning other medical operations, lies in the procedures which must be followed in arriving at the conclusion that the particular operation will be in the best interests of the minor. Under § 12F, a married, widowed, or divorced minor may consent to any and all medical services without the intervention of either his or her parents or of a court. Thus, the requirements of § 12P concerning parental or judicial approval of an abortion are inapplicable to such minors. All other minors described in § 12F seeking abortions must pursue the procedures of § 12P, although they are free to consent to any other medical procedure (except sterilization) without the involvement of their parents or of a judge. Minors not described in § 12F have only their common law rights to consent to medical services, except as expanded or limited by statute."

"7. May a minor, upon a showing of indigency, have court-appointed counsel?"

The SJC answered this question as follows (360 N.E.2d at p. 301):

"If a judge of the Superior Court determines that the best interest of an indigent minor would be served by the appointment of counsel to represent the minor, the court has the power to appoint counsel for the minor to assist her in the assertion of her constitutional rights. . . . If the mere existence of the 'burden' of seeking judicial consent to an abortion is not unconstitutionally onerous (and apparently these plaintiffs have not yet so claimed in the District Court), the circumstances that an indigent minor may have counsel appointed for her lightens the 'burden' and tends to make the requirement more acceptable constitutionally. . . . In order to avoid a constitutional question concerning the burden on the assertion of a minor's constitutional rights which would arise from a contrary interpretation, we construe the statutes of the Commonwealth to authorize the appointment of counsel of a guardian ad litem for an indigent minor at public expense, if necessary, if the judge, in his discretion, concludes that the best interests of the minor would be served by such an appointment."

"8. Is it a defense to his criminal prosecution, if a physician performs an abortion solely with the minor's own, valid, consent, that he reasonably, and in good

faith, though erroneously, believed that she was eighteen or more years old or had been married?"[8]

The SJC answered question 8 in the affirmative (*id.*, at p. 302):

> "The fifth paragraph of § 12F . . . provides such a protection to a physician. Although § 12F is not concerned primarily with abortion procedures, the Legislature did not except abortions from the broad grant of protection of the fifth paragraph of that section, as it did exempt abortions from certain other provisions of § 12F. . . . A construction of § 12F which would not extend to physicians performing abortions the same protection extended to physicians performing other operations would raise a constitutional question which we avoid by the construction of § 12F which we have adopted."

> "9. Will the Court make any other comments about the statute which, in its opinion, might assist us in determining whether it infringes the United States Constitution?"

The SJC points out that Rule 3:21 of that Court, which sets forth the certification procedure, "contemplates that only questions of law will be certified. Question 9 is not a question of law." The SJC, however, takes the opportunity under question 9 to comment on "the consequences of a determination that the differing procedures of § 12P and § 12F, as interpreted by us apart from the impact of constitutional considerations, do not survive an equal protection of the laws challenge." *Id.*, pp. 302, 303.

[8] The SJC commented (n. 21, *id.*, at p. 302):

> "The word 'valid' may not be an appropriate one in the context of the question."

It is clear that the statute as construed by the SJC is designed to assure parental, and, if necessary, judicial involvement in the pregnant minor's decision to have an abortion. The magnitude, seriousness, and urgency of the problem of teenage pregnancy and its consequences are generally acknowledged.[9] The Massachusetts Legislature had the power within the con-

[9] "Adolescents in the United States have rates of childbearing that are among the world's highest." From plaintiffs' Exh. 2 ("11 Million Teenagers") at page 7.

> "There are about 21 million young people in the United States between the ages of 15 and 19 years. Of these, more than half — some 11 million — are estimated to have had sexual intercourse — almost seven million young men, and four million young women. In addition, one-fifth of the eight million 13- and 14-year-old boys and girls are believed to have had intercourse." *Id.*, at page 9.

> "Each year, more than one million 15-19-year-olds become pregnant, one-tenth of all women in this age group. (Two-thirds of these pregnancies are conceived out of wedlock.) In addition, some 30,000 girls younger than 15 get pregnant annually. . . . Of the additional 30,000 pregnancies experienced by girls younger than 15, 45 percent were terminated by abortion . . . ." *Id.*, at page 10.

As of June 1976 there were approximately the following numbers of female adolescents residing in Massachusetts by age:

Ages 10, 11 and 12	166,500
Ages 13 and 14	113,500
Ages 15, 16 and 17	174,000
TOTAL	454,000

(Derived from answer to defendants' Request for Admission No. 1 under Rule 36, F.R.Civ.P.)

stitutional limits to enact legislation it reasonably believed would tend to alleviate the problem in Massachusetts.

The majority rely on three arguments to hold the statute unconstitutional in its entirety. One of these arguments is that the statute's failure to inform parents that they must consider only the best interests of the minor in deciding whether to consent to their daughter's abortion constitutes a heavy burden on the exercise of her right to have an abortion because she would have to go to court in case of "an improper refusal of consent."[4]

[4]The majority are of the opinion that an improper parental refusal will impose on the minor the burden of going to court or the burden of seeking alternatives to a legitimate abortion. With regard to minors seeking alternatives to a legitimate abortion, the plaintiffs' witness admitted that it is impossible to have data on that. (Oct. 18, 1977, Tr. at 106.) The majority accept plaintiffs' testimony that court proceedings would be severely detrimental to a teenager although the plaintiffs' expert admitted that she had never been to court with any of her minor patients and that she had been involved in fewer than five courtroom proceedings of any fashion. (Oct. 18, 1977, Tr. at pp. 100, 101.) A court appearance in this case was apparently not viewed as burdensome to Mary Moe I, the only minor who appeared before the court, since she "voluntarily participated" in the action. *Baird* v. *Bellotti*, 393 F.Supp. 847, 850, n. 5.

The majority opinion contains this statement (p. 8): "We begin with the testimony of defendants' expert that a substantial number of minors would refuse to consult with their parents under any circumstances." The defendants' expert's testimony, however, was as follows (Oct. 18, 1977, Tr. at 148):

> "Q. How about a pregnant adolescent? Do you have an opinion as to the extent to which a pregnant adolescent would be reluctant to discuss the matter of that pregnancy with her parents?
>
> "A. I don't know what it is you are trying to get me to say. I would qualify your question by saying that at first contact adolescent girls are reluctant to discuss it with their parents.
>
> "Q. Is it fair to say that with careful counselling a great number of those would then discuss it with their parents?
>
> "A. Yes.
>
> "Q. But there would still be a substantial number who would be reluctant to do so?
>
> "A. Yes, sir."

Parents, however, are not without notice of the standard to apply in deciding whether to consent to their daughter's abortion. The SJC's construction of the statute explicitly sets out the standard to be used: "the parent is to consider 'exclusively . . . what will serve the child's best interest.'" *Baird* v. *Attorney General*, 360 N.E.2d 288, 292 (1977). A construction by the state's highest court fixes the meaning of the statute. The "state interpretation is as though written into the ordinance itself," *Poulos* v. *New Hampshire*, 345 U.S. 395, 402 (1953); it "puts these words in the statute as definitely as if it had been so amended by the legislature." *Winters* v. *New York*, 333 U.S. 507, 514 (1948). See *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432 (1963); *Commonwealth* v. *Richards*, ____ Mass. ____, 340 N.E.2d 892, 894 (1976). A state court construction of a statute is notice to all concerned of what the statute provides. See *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973) (by implication).

The majority anticipate that many parents will mistakenly find parents' rights included in the language of the statute, but

Although the Supreme Court in *Bellotti* v. *Baird* did not reach the issue of whether a court hearing would be an impermissible burden on a minor's rights, of the five justices who held the parental consent requirements unconstitutional in *Planned Parenthood*, *infra*, two indicated that they would approve of a statute which contained provisions for a court proceeding. "[A] materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest." *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., with Powell, J.).

This court has already ruled that for purposes of this facial attack the question of burdensome court procedures is a non-issue. "[W]e rule now that we will conclusively assume, for the purposes of our decision, utmost speed, diligence, and proper procedure and consideration, including protection of privacy by the Superior Court and an Appellate Court." (Apr. 13, 1977, Hearing Tr. at p. 3.)

they give no reason for assuming that many parents will be familiar with the language of the statute and not assuming the same familiarity with the SJC's construction of the statute. If we are to assume that many parents are sufficiently informed to have knowledge of the exact language of the statute, it is reasonable to assume that they would also be informed of the statute's construction.[5] In any case, the construction of the statute is now part of the law and it is a general rule of law that all persons are presumed to have notice of all that the law contains. The statute as construed unequivocally states that parents are to consider only the minor's best interests. It is hard to imagine how this could be stated more clearly.

The majority attribute to the Legislature the deliberate intent to make the statutory language imprecise because the 1977 re-enactment of the statute failed to spell out the standard for parental consent defined by the SJC. This argument appears to be wholly without merit. The purpose of the 1977 re-enactment was to make corrective changes in the numbering of the sections of the statute. At the same time of the original enactment of the statute on abortion, there were already in existence statutory sections with the same numbering as the abortion sections. See *Bellotti* v. *Baird*, 428 U.S. 132, 134, n. 1. In 1977 the Legislature merely corrected this duplication by enacting the statute with different numerical designations. No changes in substance were made. In view of the purpose of the re-enactment, the majority finding that the Legislature "welcomed" imprecision is inaccurate. In fact, if any intention regarding the meaning of the statute is to be attributed to the Legislature's re-enactment, it must be that the Legislature intended the judicial construction to be part of the statute. "It is a well settled rule of statutory interpretation

[5] On vital issues, such as those relating to abortion and adolescents, decisions of the SJC have substantially the same dissemination and publicity as legislative enactments.

that, when a statute after having been construed by the courts is re-enacted without material change, the Legislature are presumed to have adopted the judicial construction put upon it." *Nichols* v. *Vaughan*, 217 Mass. 548, 551 (1914); *Commonwealth* v. *Benoit*, 346 Mass. 294, 297 (1963); *Lorillard* v. *Pons*, 46 U.S.L.W. 4150, 4151 (U.S. Feb. 22, 1978). Thus, the statute contains legally sufficient notice that parents are to consider only the best interests of their child.

Another reason relied upon by the majority in holding the statute unconstitutional is that the statute has an absolute requirement of parental notification and that there are reasons why it could be in a minor's best interests for her parents to be kept in ignorance of her pregnancy. The majority found that the exact number of minors who are injured by this requirement is unimportant. However, the evidence does indicate that the cases where parental notification may not be in a minor's best interests are exceptional and of rare occurrence.[6] Plaintiffs' expert estimated that in her practice parental consultation is "objectively contraindicated"[7] only about 5 to 10 percent of the time. (Oct. 18, 1977, Tr. at p. 103; Deposition of Dr. Nadelson at I-41.) Another plaintiffs' experts, commenting on how "extremely important" parental involvement is, noted that "there is the *rare* case where it is impossible to

[6] In their opinion the majority point out that the defendants concede that an appreciable number of parents are not supportive and that these include parents who would inflict physical harm, insist on an undesired marriage or continuance of pregnancy as punishment. This impression of parental behavior which the majority creates fails to note the limitation in the concession made by the defendants. Defendants stated that an "appreciable number" means only that such parents exist. The defendants made no admission as to the frequency of occurrence of this phenomenon. (Defendants' Responses to Plaintiffs' Requests for Admission, ¶ 7.)

[7] "Objectively contraindicated" was used by the witness to mean that the witness, as a doctor, would agree that parental consultation is contraindicated. (Oct. 18, 1977, Tr. at 102.)

obtain." (Dec. 7, 1974, Tr. at 67.) (Emphasis added.) The "usual situation" is that the minor's fears of telling her parents are not realized, and if the minor's fears were taken at face value and her parents not involved, she and her family would have lost the benefit of parental involvement. (Dec. 30, 1974, Tr. at 77, 123.) The majority in the case at bar assumed in their first opinion that most parents would seek to be supportive of their minor daughters. 393 F.Supp. 847, 853 (D. Mass. 1975). The evidence shows that in the great majority of cases parental involvement will be in the minor's best interest. The statute should be "judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Califano* v. *Jobst*, 46 U.S.L.W. 4004, 4007 (U.S. Nov. 8, 1977). In this case, according to plaintiffs' own testimony, the typical, "run of the mill" situation is that a minor's fears about involving her parents are not realized. (Dec. 30, 1974, Tr. at 77.) Since in the majority of cases the statute will operate to protect minors from the consequences of decisions which they are not capable of making alone,[8] an imputation of unsupportive parental behavior in a concededly small number of cases[9] should not be held to outweigh the beneficial effects provided by the statute for the majority of minors.

The majority also express doubt of the "efficacy" of "last minute" parental consultation, reasoning that parents have many years to guide their children, and if communication has not been established before pregnancy, "last minute" consultation will not be beneficial. This reasoning is not persuasive. Does the majority perhaps attribute greater efficacy to a "last minute" consultation at an abortion facility, such as occurred in the case at bar?[10] Is it not far more likely that the

[8] Plaintiffs admit that: the abortion decision-making process is the most difficult aspect of the experience for the girl (Plaintiffs' Responses to Defendants' Requests for Admissions, ¶ 67); an adolescent lacks experience with her feelings and does not have the emotional control of an adult (*id.*, ¶ 53); ambivalence is especially prominent among adolescents (*id.*, ¶ 58); a period of intense anxiety and ambivalence is often experienced in the twenty-four hours prior to an abortion (*id.*, ¶ 57); a pregnant adolescent is " a child potentially bearing a child" (*id.*, ¶ 59); and the girl who makes her decision in collaboration with her parents seems the best prepared (*id.*, ¶ 67).

[9] In note 5 of their opinion the majority reject the defendants' argument that in those exceptional cases where parental involvement may not be in the minor's best interests, an "as applied" proceeding would be the proper method to resolve the problem. In my view the defendants' argument is valid. This court would have jurisdiction over questions of the constitutional permissibility of specific applications of the statute and in "as applied" proceedings could determine whether the statutory requirement of parental involvement is constitutionally permissible. In such proceedings the court would have concrete facts before it and the benefit of arguments of counsel to enable it to focus on the problem.

[10] December 31, 1974, Testimony of Mary Moe I:

"Q. (by Mr. Lucas) When did you first contact Parents Aid Society?
"A. About five minutes after I found out I was pregnant.
"Q. And do you recall with whom you talked?
"A. To Marilyn.
"Q. About how long?
"A. About ten minutes.
"Q. Did you make an appointment at that time?
"A. Yes, I did.
"Q. Did she promise they would do an abortion on you at that time?
"A. Yes, she did.
"Q. Did she tell you you would have to have counseling first?
"A. She explained the whole thing to me on the phone. They also explained at the Women's Health Clinic. They had counseling and different things like that. She explained that I would go to counseling and they would perform the abortion, and it would take about five minutes, and I would go in the recovery room. She just briefly described it and when I came in, you know, they would go into more detail.
"Q. Did she tell you you would see a doctor at any time?
"A. Yes, Dr. Zupnick, who performed the abortion.

pregnant adolescent would find more concerned guidance and care at the hands of her parents and the family physician? The majority fail to recognize the value of providing parents with the opportunity to consult with their minor children at the time that the children are faced with the necessity of making important decisions. They would appear to require that parents anticipate the variety of situations that may confront their children and prepare them in advance to deal with any problem that may arise during the course of the child's minority. However, a "last minute" opportunity may be the parents' only opportunity to offer guidance and assistance to their daughter on her abortion decision. Although good communication is established between parent and child, communication on the particular subject of abortion may not arise in the absence of an actual pregnancy experience. Even where parents have previously discussed their views on abortion with their children, the parents should not be denied the opportunity to counsel and assist their daughter in her real-life abortion problem if it actually arises. Communication at

"Q. Did she indicate when you talked to her they would definitely perform the abortion?

"A. Yes, before November 1st.

"Q. Did she place any conditions on what she said? Did she indicate you had to meet with the doctor first, for example?

"A. No, she didn't.

"Q. Did they have any difficulty scheduling you before November 1st?

"A. Well, she told me right then they would schedule me but they weren't sure about the time and everything because they had to get it in before November 1st.

"Q. Was it difficult for you to come in as early as you did?

"A. I wanted it, yes, like for a week later, because it would have been more convenient. (Transcript at 137, 138.)

On the procedure actually followed at the abortion facility of the plaintiffs in the case at bar, see also n. 8 of the dissenting opinion *Baird* v. *Bellotti*, 393 F.Supp. 847, at pp. 859-860.

such time would be of the utmost importance. See *Doe* v. *Irwin*, 441 F.Supp. 1247, 1252-1253 (W.D. Mich. 1977). The deep interest and concern that parents naturally have in the welfare of their children constitute a human resource of great value and its utilization should be encouraged. It is common sense to assume that many pregnant minors would be reluctant to confront their parents with their pregnancy. The majority have raised that reluctance to constitutional status by giving the minor the right to conceal her pregnancy from her parents. This action not only encourages concealment and deception within the family unit, but also wastes vast and valuable parental resources.

In addition to proving directly beneficial to the pregnant minor, the statute's requirement of parental notification also provides assistance to others who may have a role in the minor's abortion decision. In those cases where a superior court judge is asked to consent to a minor's abortion, parental participation in the judicial proceeding will make available to the judge information on the minor's medical, social and emotional background which would be important for him to know in arriving at reliable findings on the degree of the minor's maturity, and the reasonableness of her decision. The SJC has ruled that the statutory standard for a judicial order granting consent to a minor's abortion is the best interest of the minor. To carry out his role in determining the best interests of the minor, a judge must have knowledge of all the relevant circumstances in the minor's life. A minor's parents are the persons who normally have the most knowledge of the many aspects of their daughter's life and their input in a judicial proceeding may well supply the judge with valuable information in determining what is in the minor's best interests. Also, if counsel is appointed for the minor in the judicial proceeding, counsel's access to the minor's parents and the knowledge they have of her background may result in providing the minor with more effective representation.

A third reason advanced by the majority for striking down the entire statute is that the statute permits a superior court judge to override an "informed and reasonable decision to have an abortion" made by a pregnant minor whom the judge has found to be capable of making such a decision. I would hold the part of the statute which authorizes a judge to override the minor's decision in such a case constitutionally invalid. In *Roe* v. *Wade*, the Supreme Court held that a woman's constitutional right of privacy includes the right to decide whether or not to terminate her pregnancy. 410 U.S. 113, 153-154 (1973). In *Planned Parenthood*, the Court extended this privacy right to minors and held that "the State may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." 428 U.S. at 74. These two cases establish that the state does not have the constitutional authority to delegate to a judge the power to unconditionally prohibit a mature minor, capable of making an informed abortion decision, from terminating her pregnancy. Under the Constitution as construed in *Roe* and *Planned Parenthood*, the state itself lacks the power to interpose an unconditional veto to the abortion decision of a mature minor and her physician.

In *Planned Parenthood*, however, the Court further stated (at p. 75):

> "We emphasize that our holding that § 3 (4) [absolute requirement of parental consent] is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy [citing *Bellotti* v. *Baird*, decided on the same day]. The fault with § 3 (4) is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination

> of her pregnancy and does so without a sufficient justification for the restriction. . . ."

Mr. Justice Stewart, with whom Mr. Justice Powell joined, concurring with the Court, noted (at pp. 90-91):

> "With respect to the state law's requirement of parental consent, § 3 (4), I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Bellotti* v. *Baird*, post, [428 U.S.] at 132, 147-148, suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child. (Footnote omitted.)
>
> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." (Footnote omitted.)

In note 1 on page 91, Mr. Justice Stewart referred to the opinion of Mr. Justice Stevens (*id.*, pp. 102-105) concurring in part and dissenting in part, for some of the considerations that support the State's interest in encouraging parental consent.

Under the SJC's construction of the statute, a judge may disregard a minor's informed and reasonable decision if he determines that an abortion is not in her best interests. 360 N.E.2d at p. 293. Under that interpretation, a minor's decision may be found to be both informed and reasonable and still not be in her best interests. I fail to see how a minor's decision found to be truly informed and reasonable can at the same time be found to be contrary to the minor's best interests. The provision vesting in the judge the power to override a minor's "informed and reasonable decision" because it is not in her best interest would appear to be self-contradictory and incapable of rational application. If the judge found the minor's decision not to be in her best interests, how could he consistently find it to be reasonable? The lack of any ascertainable principle to guide a judge in differentiating between concepts of what is a reasonable and informed course for the minor to take and what course is in the minor's best interests leaves the resolution of the problem to the arbitrary will of the judge. I would strike the provision for judicial override and would limit the judge's role to a determination of whether the minor is capable of making the decision and whether her decision to have an abortion is informed and reasonable.

However, a statute invalid in part is not necessarily void in its entirety. The provision in the statute allowing a judicial override of a mature minor's informed consent may be severed from the statute.[11] The Supreme Court has firmly rejected "a

[11] The majority define severability as "a process of striking out," n. 10, and under this definition, striking out the provision for judicial override constitutes a severance. However, as stated by Mr. Justice Cardozo, "Severance does not depend upon the separation of the good from the bad by paragraph-

severability rule that required invalidation of an entire statute if any part of it was unconstitutionally overbroad, unless its different parts could be read as wholly independent provisions. . . . Consequently, we need not find . . . [a statute] constitutional in all its possible applications in order to uphold its facial constitutionality." *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971). "The general rule on separability, when part of a statute or some of its applications are declared to be constitutionally invalid is that the rest of the statute shall stand intact if the valid provisions or applications are capable of being given effect standing alone, and if the Legislature would have intended the statutes to stand with the invalid provisions stricken out." *Baird* v. *Davoren*, 346 F.Supp. 515, 522 (D. Mass. 1972). See *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976); Opinion of the Justices, 330 Mass. 713, 726 (1953). The final authority on whether or not a state law should be construed as severable is the state court. *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924); *Stevens* v. *Campbell*, 332 F. Supp. 102, 107 (D. Mass. 1971). The Massachusetts Supreme Judicial Court has stated that it is clear "the Legislature intended to pass an act which was constitutionally acceptable and, *even more important*, to save as much of the statute's purpose as it could if any explicit statutory provision could not survive constitutional attack. Statute 1974, c. 706, § 2, provides that '[i]f any section, subsection, sentence or clause of this act is held to be unconstitutional, such holding shall not affect the remaining portions of this act.'" 360 N.E.2d at 291. (Emphasis added.) The SJC's finding of legislative intent is binding on us. In view of the language used, it cannot seriously be doubted that

or sentences in the text of the enactment. . . . The principle of division is not a principle of form. It is a principle of function." *People* v. *Knapp*, 230 N.Y. 48, 60, 129 N.E. 202, 207 (1920). Invalid applications, as well as invalid sentences or paragraphs, may be severed. *Loeb* v. *Columbia Township Trustees*, 179 U.S. 472, 490 (1900); *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971); *Doliner* v. *Town Clerk of Millis*, 343 Mass. 10, 15 (1961).

the Legislature would have intended the statute to stand with the invalid provision stricken. It is the expressed intention of both the Legislature and the SJC that as much of the statute as possible be saved. The invalidation of the entire statute would destroy a method of structuring the abortion decision designed to protect the very large and continuing class of pregnant minors.[12] By far the better course is to allow the law to operate where it can do so constitutionally, which, under the challenged statute, is in the great majority of the cases governed by it.

The severance of the judicial override will leave the essence of the statutory scheme intact. This is not an instance of judicial excision making the remainder of the statute difficult to interpret or apply. *Baird* v. *Eisenstadt*, 429 F.2d 1398, 1399 (1st Cir. 1970), *aff'd on other grounds*, 405 U.S. 438 (1972). The exclusion of the judicial override would leave the remainder of the statute entirely clear.

The majority also find that the statute constitutes a denial of equal protection in that it unreasonably distinguishes "between a minor and an adult, given a finding of maturity and informed consent." By striking the provision on judicial override, a minor who is found by a judge to be capable of a reasonable and informed consent will be treated as an adult and allowed to exercise her right to an abortion.

Plaintiffs contend that the statute denies equal protection in that it irrationally distinguishes between abortions and other

[12] The value to a minor of parental involvement in her abortion decision-making is not disputed. (See Plaintiffs' Responses to Defendants' Requests for Admissions, ¶ 67; Defendants' Responses to Plaintiffs' Requests for Admissions, ¶ 6; Dec. 7, 1974, Tr. at 27, 67; Dec. 30, 1974, Tr. at 9, 48, 75, 77, 86, 119, 131; Dec. 31, 1974, Tr. at 24; Jan. 28, 1975, Tr. at 18, 33, 49, 50.)

medical procedures because the mature minor rule[13] and Mass. G.L. c. 112, § 12F,[14] which allow certain minors to consent to medical procedures without parental involvement, are

[13] "[W]here the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth." 360 N.E.2d at 296.

[14] Mass. G.L. c. 112, § 12F: "No physician, dentist or hospital shall be held liable for damages for failure to obtain consent of a parent, legal guardian, or other person having custody or control of a minor child, or of the spouse of a patient, to emergency examination and treatment, including blood transfusions, when delay in treatment will endanger the life, limb, or mental well-being of the patient.

"Any minor may give consent to his medical or dental care at the time such care is sought if (i) he is married, widowed, divorced; or (ii) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or (iii) he is a member of any of the armed forces; or (iv) she is pregnant or believes herself to be pregnant; or (v) he is living separate and apart from his parent or legal guardian, and is managing his own financial affairs; or (vi) he reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease.

"Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization.

"Consent given under this section shall not be subject to later disaffirmance because of minority. The consent of the parent or legal guardian shall not be required to authorize such care and, notwithstanding any other provisions of law, such parent or legal guardian shall not be liable for the payment for any care rendered pursuant to this section unless such parent or legal guardian has expressly agreed to pay for such care.

"No physician or dentist, nor any hospital, clinic or infirmary shall be liable, civilly and criminally, for not obtaining the consent of the parent or legal guardian to render medical or dental care to a minor, if, at the time such care was rendered, such person or facility: (i) relied in good faith upon the representations of such minor that he is legally able to consent to such treatment under this section; or (ii) relied in good faith upon the representations of such minor that he is over eighteen years of age.

"All information and records kept in connection with the medical or dental care of a minor who consents thereto in accordance with this section shall

not applicable to abortions.[15] In *Bellotti* v. *Baird*, the Supreme Court stated: "As we hold today in Planned Parenthood, however, not all distinctions between abortion and other procedures is forbidden. . . . The constitutionality of such distinction will depend upon its degree and the justification for it." 428 U.S. at 149, 150.

The traditional rational basis test is to be used in testing any classifications made by the statute, since no suspect classification is involved, *Maher* v. *Roe*, 432 U.S. 464, 471 (1977), and a state need not establish a compelling interest for treating abortion differently from other medical procedures unless the state treatment is an unduly burdensome interference with a woman's freedom to decide whether or not to abort. *Id.*, at 473. A state's interest in its minor citizens may be furthered by placing regulations on a minor's conduct which might be impermissible if imposed on an adult. *Ginsberg* v. *New York*, 390 U.S. 629, 638-639 (1968). Section 12S (formerly § 12P), by requiring parental involvement in a minor's abortion decision, helps the minor to arrive at a decision that is in her best interests and does not preclude or unduly burden the exercise of her privacy rights.[16]

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be confidential between the minor and the physician or dentist, and shall not be released except upon the written consent of the minor or a proper judicial order. When the physician or dentist attending a minor reasonably believes the condition of said minor to be so serious that his life or limb is endangered, the physician or dentist shall notify the parents, legal guardian or foster parents of said condition and shall inform the minor of said notification."

[15]"Our discussion of the mature minor rule as to operations generally has no application to non-emergency abortions because parental consultation, if possible, is mandated by statute." 360 N.E.2d at 297.

Mass. G.L. c. 112, § 12F: "Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization."

[16]The Supreme Court has indicated that strict scrutiny is improper when reviewing statutes dealing with the privacy rights of minors and that state regulations inhibiting these rights are valid "if they serve 'any significant

Under the rational basis test the distinctions drawn by the statute must be rationally related to a constitutionally permissible purpose. *Maher* v. *Roe*, 432 U.S. at 478. The Massachusetts statute, section 12P (now § 12S), clearly satisfies this standard. In fact, the state interests furthered by the statute greatly exceed this minimal level and are also sufficient to withstand a test if heightened scrutiny.

The Supreme Court has already found that abortion differs significantly from other medical procedures. "The simple answer to the argument that similar requirements are not imposed for other medical procedures is that such procedures do not involve the termination of a potential human life."[17] *Maher* v. *Roe*, 432 U.S. at 480. This fundamental difference between abortion and other medical procedures is sufficient to justify separate treatment for the abortion decision. The

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state interest . . . that is not present in the case of an adult.'" *Carey* v. *Population Services International*, 431 U.S. 678, 693 (1977). "This test is apparently less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults. . . . Such lesser scrutiny is appropriate both because of the States' greater latitude to regulate the conduct of children, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Ginsberg* v. *New York*, 390 U.S. 629 (1968), and because the right of privacy implicated here is 'the interest in independence in making certain kinds of important decisions,' *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977), and the law has generally regarded minors as having a lesser capability for making important decisions. See, *e.g.*, *Planned Parenthood*, 428 U.S., at 102 (STEVENS, J., concurring in part and dissenting in part)." *Id.*, at n. 15.

[17]A basic difference between abortion and other medical procedures was noted by plaintiffs' expert witness when she was asked to compare the psychological impact of an abortion with the impact of another medical procedure, such as a tonsillectomy. She testified that "they are really not comparable issues. . . . You are dealing with apples and oranges. They are not the same kind of thing. A tonsillectomy is a procedure that is done because you have something wrong . . . You have been sick. An abortion is something where you are not sick . . . a tonsillectomy is, basically, a noncontroversial procedure which the doctor recommends and people generally go along with." (Deposition of Dr. Nadelson, I-30-33.)

state's compelling concern for the welfare of its minor citizens creates an additional interest justifying the statute since the state's interest in protecting the health and welfare of its adolescents is certainly a constitutionally permissible one. The statute aims at ensuring that a minor understands and takes seriously the message of pregnancy.[18] In providing a structure to minimize the possibility of improvident decisions with serious consequences, the statute furthers the state's important interest in protecting its young citizens. It is clear that abortion has psychological and emotional consequences which are unique and that decisions to abort involve considerations that are not present in decisions to undergo other medical procedures. Where minors are involved, the problems in making a decision to abort are intensified. See note 8, *supra*. Thus, the fundamental difference between abortion and other medical procedures and the state's compelling concern for its minor citizens justify separate consent requirements for a minor's abortion decision.

Plaintiffs also argue that the statute irrationally discriminates between unmarried and married, widowed or divorced minors. The distinction between married (or formerly married) and unmarried minors is not irrational. Married minors have left their parents' families to create a new family with new responsibilities; they have become emancipated and their parents are no longer legally responsible for them. See *Califano* v. *Jobst*, *supra*, at 4006. They have obtained parental consent to their marriage. Mass. G.L. c. 207, § 7. A married minor's decision to abort does not affect her parents and their responsibility to her in the same way as does an unmarried minor's decision to abort. The statute simply recognizes that marriage alters the relationship between a minor and her parents.

The Legislature has enacted a statute which is designed to aid a pregnant minor in making a reasoned decision whether or not to terminate her pregnancy.[19] The statute logically selects the minor's parents as the appropriate persons to be given the opportunity in the first instance to guide their child, because they are the natural and legal guardians of the child. If the parents refuse consent, the state, through its courts, in its role of parens patriae, will be available to protect the minor's interests. With the severance of the provision for judicial override, where the minor has made an informed and reasonable decision, the judge will consent to her abortion. If she is found incapable of giving an informed consent, the judge will either grant or withhold consent depending on which course he finds on the evidence to be in the minor's best interests.

The importance of the parental role in the upbringing of children has been well established and repeatedly reaffirmed by the Supreme Court. *Myer* v. *Nebraska*, 262 U.S. 390, 399

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[18]The evidence shows a high rate of recidivism of unwanted teenage pregnancies. See Plaintiffs' Responses to Defendants' Requests for Admissions, ¶ 37; Oct. 18, 1977, Trial Tr. at 95. Plaintiffs admit that "[f]or the adolescent, failure of resolution of the unwanted pregnancy crisis can potentially arrest development progress. The message of pregnancy must be understood and taken seriously if repetition is to be avoided." (Plaintiffs' Responses to Defendants' Requests for Admissions, ¶ 59; see also *id.*, ¶ 56.)

[19]The majority express disapproval of the "chameleon-like" statute which the SJC has construed to "require as much parental consultation as is permissible constitutionally." 360 N.E.2d at 294. The majority demand greater precision from the Legislature than can be reasonably expected in this area of the law. The Supreme Court has not yet defined the permissible scope of parental involvement in an unmarried minor's decision to seek an abortion. In view of the Legislature's attempt to obtain maximum parental input within constitutional limits, the element of flexibility in the SJC's construction is reasonable. Insisting that the Legislature enact a statute that is perfect from its inception and striking down any attempt that does not meet this standard, while refusing to give the Legislature any clear guidance on what would be permissible, does not appear to afford a better solution.

(1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); *Wisconsin* v. *Yoder*, 406 U.S. 205, 232-233 (1972); *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 843-844 (1977); *Zablocki* v. *Redhail*, 46 U.S.L.W. 4093, 4096 (U.S. Jan. 18, 1978). Parental authority and the family unit have been constantly accorded constitutional protection because of legislative and judicial recognition that the family is fundamental in our society. *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). *Moore* v. *East Cleveland*, 431 U.S. 494 (1977). "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.*, at 503-504.

Parents have rights and responsibilities that inhere in the parent-child relationship and stem from the fact, nature and purpose of parenthood. These rights and responsibilities are not inimical to the minor's rights and welfare. They exist for the benefit of the child and reflect the child's very real need for proper guidance and protection during the child's formative years. The state has a compelling interest in protecting the parental rights and duties against unauthorized intrusion by third persons. The statute under attack expresses this compelling interest.

The parental right to control, subject to constitutional limitations, the upbringing of children is a natural counterpart to the parental duty to support, guide and protect the child. The occurrence of pregnancy in a minor does not absolve her parents of responsibility to support, protect and guide their daughter, nor does it eliminate the daughter's need for parental support, protection and guidance. To the contrary, it is a period when parental assistance is urgent.

The state has a compelling interest in protecting and furthering the health and welfare of its minors.[20] It has done so in this statute by protecting them from undue outside influences and hasty, unreasoned decisions on abortions. This is a permissible exercise of state power and the statute is therefore constitutional.

For the reasons stated in this and in my previous[21] dissenting opinion, I would uphold the constitutionality of the statute.

ANTHONY JULIAN,
U.S. Senior District Judge.

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[20] See the opinions in *Danforth* which comment on the state interests which justify legislation in this area:

> STEWART, J., with POWELL, J.:
> "There can be little doubt that the state furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support." 428 U.S. at 91.
>
> WHITE, J., with BURGER and RHENQUIST, JJ.:
> "The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests." 428 U.S. at 95.
>
> STEVENS, J.:
> "The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible . . . [E]ven if it [the abortion decision] is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative." 428 U.S. at 102-103.

[21] 393 F.Supp. at p. 857.

Supreme Court, U. S.
FILED
DEC 14 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the
Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-329, 78-330

FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS IN NO. 78-329,
AND
JANE HUNERWADEL,
APPELLANT IN NO. 78-330

v.

WILLIAM BAIRD ET AL.,
APPELLEES IN NOS. 78-329, 78-330

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Volume II
Transcripts and Depositions

Appeals Docketed August 25, 1978

Jurisdiction Noted October 30, 1978

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United States District Court
District of Massachusetts.

WILLIAM BAIRD; MARY MOE I;
GERALD ZUPNICK, M.D.; PARENTS
AID SOCIETY, INC.; and all
others similarly situated,
PLAINTIFFS,

v.

FRANCIS X. BELLOTTI, Attorney General
of the Commonwealth of Massachusetts;
GARRETT BYRNE, District Attorney of the
County of Suffolk; their agents, successors,
those acting in concert with them, and all
others similarly situated,
DEFENDANTS,

JANE HUNERWADEL, individually and
on behalf of all others similarly situated
and, further, as next friend of her minor
daughters who are of childbearing age and
are or may become pregnant, and all others
similarly situated,
DEFENDANT-INTERVENOR.

CIVIL ACTION
No. 74-4992-F

Transcript of Testimony.

DECEMBER 7, 1974.

. . . . . .

[13] MR. LUCAS: We are prepared to call our first expert witness.

JUDGE ALDRICH: Go ahead.

MR. LUCAS: Dr. Somers Sturgis.

SOMERS H. STURGIS, Sworn
Direct Examination by Mr. Lucas

Q. Would you state your name and address, please, sir?

A Somers H. Sturgis, 47 Raymond Street, Cambridge, Mass.

Q What is your current position?

A At present I am emeritus professor at Harvard in gynecology and I am a consultant in gynecology to a local university health service.

Q Are you licensed to practice medicine in the Commonwealth of Massachusetts?

A Yes.

Q I would like to show you your curriculum vitae and ask you to identify it.

MR. LUCAS: Let me first show it to the defendants.

JUDGE ALDRICH: Doctor, this is a large courtroom. Quite apart from the persons in the back [14] of the courtroom who may not be able to hear you, we cannot hear you.

Mr. Lucas, we have the same problem with you and even more so because the doctor has a microphone and you don't.

MR. LUCAS: I ask the Clerk to mark this Exhibit 1.

(Curriculum vitae of Dr. Somers H. Sturgis marked Plaintiffs' Exhibit 1 for Identification.)

Q Would you tell the Court what Exhibit 1 is, Dr. Sturgis?

A This is my curriculum vitae giving my appointments, my background and experience and my professional qualifications, together with the societies, medical and other, that I belong to, and a list of some 145 publications that are in the medical literature.

Q Have you specialized in any particular field during your career?

A Since the war I have been in gynecology, having been trained originally as a surgeon, general surgeon, and after the war I concentrated in gynecology entirely for the last 30 years, since 1945.

JUDGE FREEDMAN: May I ask you, Doctor, which war you are referring to, since we have had [15] nothing but wars of late?

THE WITNESS: The Second World War.

Q Are you a member of any national gynecological organizations?

A I am a member of a good many national as well as local organizations. I am a diplomate of the American Board of Obstetrics and Gynecology, as well as surgery, and a member of the American Gynecological Society, as well as surgical societies but most of them gynecological and obstetrical.

Q Would you describe the extent of your clinical experience in gynecology over the years?

A I have been in practice for — well, it comes to 19 years since I got back from World War II, and in that time I have been rather more interested in the emotional side of gynecology, particularly in young people, in adolescents. In 1950 I was asked by Dr. Roswell Gallagher to be the gynecological consultant to the first Adolescent Clinic in this country. Dr. Gallagher set up this first clinic devoted entirely to adolescents at the Children's Hospital, the Children's Medical Center now, in 1950, and from that time on I have been gynecological consultant to this adolescent group — this has been not only in my private practice but with the [16] Children's Medical Center, as well as the fact that I am now consultant to a college age group, that is from 16 or 17 to 19 or 20, locally, a college group at a neighboring university.

Q Are you familiar with the prevailing national and local standards of acceptable medical practice in the gynecology field?

A I certainly am, having been a member of many national societies, and of course receiving the bulletins from the College of Obstetrics and Gynecology, as well as other journals devoted to this specialty.

Q Have you been involved in the promulgation of any of these standards by the national society, the American College of Obstetricians and Gynecologists?

A Yes. I was a member of a committee of the American College of Obstetricians and Gynecologists back in 1968. This was a subcommittee for the Committee on Life, Education and Behavior of the College. This numbered nurses, doctors and social workers. It was a behavioral group. This subcommittee was asked to bring recommendations to the College concerning certain sexual problems, particularly in young people.

Q There are two statements in one report. I would [17] like to ask you to identify them.

MR. LUCAS: First, I will show them to counsel for the defendants. I would like to have this marked as Exhibit 2 and this one as Exhibit 3, and this statement marked Exhibit 4.

(Statement of American College of Obstetrics and Gynecology, dated February 10, 1973, and amended June, 1974, marked Plaintiffs' Exhibit 2 for Identification.)

(Statement of American College of Obstetrics and Gynecology, dated April 10, 1973, marked Plaintiffs' Exhibit 3 for Identification.)

(Statement submitted to Executive Board of the American College of Obstetrics and Gynecology re Sexual Crises in the Minor Girl marked Plaintiffs' Exhibit 4 for Identification.)

Q Dr. Sturgis, could you identify for the Court these exhibits?

JUDGE ALDRICH: Do you have objection?

MR. BEHAR: I would like the record to show we are not acquiescing in the introduction of these as exhibits. They are marked for identification, as I understand it, and have not been incorporated as exhibits.

JUDGE ALDRICH: It will be understood they are all marked for identification at this time except No. 1.

[18] Q Would you identify them as 2 through 4, please?

A Exhibit 2 is a statement by the American College of Obstetrics and Gynecology. This is dated February 10, 1973, and was amended June, 1974. This is a statement of policy.

Exhibit 3 is again a statement by the American College of Obstetrics and Gynecology on the unmarried mother. This is again a policy statement. It has a date of April 10, 1970.

The fourth exhibit, No. 4, is a statement submitted to the Executive Board of the American College of Obstetrics and Gynecology by the subcommittee that I mentioned, of which I was a member, concerning sexual crises in the minor girl, in which our committee took up venereal disease in the minor girl, how it is to be handled by the profession or suggesting how it be handled, plus abortion, plus emotional crises of a sexual nature. Those three issues were taken up by this committee in Exhibit 4.

Q Was Exhibit 2 approved by the entire American College of Obstetrics and Gynecology?

A Yes. Exhibit 2 is a College statement on abortion.

Q Is Exhibit 3 also a College statement?

A That is correct.

Q And what branch of ACOG approved Exhibit 4, the [19] entire College or the committee?

A The College published our statement, Exhibit 4, in the monthly bulletin, although it had not been at that time accepted by the Executive Committee of the College as a policy.

Q Is there anything in Exhibit 2, Statement on Abortion, which mandates parental consent for minors under age 18?

A There is nothing at all in there on that score.

Q Is there any recommendation or provision in Exhibit 3 which mandates parental consent for minors under 18?

A No, sir, there is not.

Q Is there any recommendation which mandates parental consent in Exhibit 4?

A This is something that is taken up in Exhibit 4, in three pages, and that is very much my concern, and I would like to, if I may, answer that in this way. We recognize that an unwanted pregnancy —

MR. REYNOLDS: Objection. He has answered the question.

JUDGE ALDRICH: I can't hear you.

MR. REYNOLDS: He has already answered the question that was asked him.

JUDGE ALDRICH: Would you identify [20] yourself?

MR. REYNOLDS: Robert J. Reynolds.

JUDGE ALDRICH: And you appear for whom?

MR. REYNOLDS: The intervenors, sir.

JUDGE ALDRICH: You haven't been allowed to intervene.

MR. REYNOLDS: I beg the Court's pardon.

MR. BEHAR: Your Honor, may I request clarification?

JUDGE ALDRICH: Excuse me. You have been allowed to intervene.

MR. REYNOLDS: I thought I was.

JUDGE ALDRICH: The motion to exclude you has not been allowed. I beg your pardon. You may proceed.

MR. REYNOLDS: May I have a ruling on my objection, if your Honor please.

JUDGE FREEDMAN: What is the basis for your objection?

MR. REYNOLDS: That he has already answered the question that was asked him.

He said he would like to tell more about this.

JUDGE ALDRICH: All right. Ask him if he would like to tell more about it.

[21] Q Would you describe the contents and findings in Exhibit 4?

A Yes, sir. I would like to say that we considered in the committee the fact that an unwanted pregnancy is sometimes a social and emotional tragedy to an adult and that when the mother herself is a child it is even worse. The adult, now woman, has received the privilege of the option of terminating pregnancy, yet the minor, the child, is in a much more serious predicament.

We faced this from the point of view of the surgeon or gynecologist when a minor child comes to him for termination of pregnancy but refuses to let her parents know, and this is an extremely serious dilemma for the medical profession, and we felt that there were only three possible answers that he could give.

One would be to refuse this child, not to do anything at all, and to send her along. Another would be to tell her parents in spite of the fact she says she would not allow this. And the third would be to try to give her whatever medical resolution of the problem might be right.

We felt that the first situation was perhaps the worst — to send this child away without [22] any help at all, in which case certainly if she had gone to an illegal abortionist and had severe complications or even death the doctor who sent her away might indeed find himself responsible for that. We felt —

MR. REYNOLDS: May I enter an objection, if your Honor please. The witness was simply asked to identify this document at this time.

JUDGE ALDRICH: Well, in this instance he is talking about Exhibit 4 which is, as I understood it, a report from a committee that he was a member of.

MR. REYNOLDS: That is correct, sir. What we are doing, as I understand it, at this time is simply identifying the document.

JUDGE ALDRICH: You would rather he gave his personal opinion rather than the opinion of the committee?

MR. REYNOLDS: That is one ground for my objection. It is my understanding that we are simply identifying these documents which have been marked for identification and not as exhibits. I want to object to each and every one of them.

JUDGE ALDRICH: I can understand that you want to object to the introduction of this as an [23] exhibit. Why don't we pass on the admissibility of all three exhibits?

MR. LUCAS: Exhibit 1 I should formally move admission of.

JUDGE ALDRICH: Exhibit 2.

MR. LUCAS: I would like to move the admission of Exhibit 2 as an accurate copy of the Statement on Abortion of the American College of Obstetricians and Gynecologists.

JUDGE ALDRICH: It is received.

It would save time if we had three copies.

MR. LUCAS: I think we have some extra copies.

JUDGE FREEDMAN: These are copies of a statement from the American College of Obstetricians Gynecologists of which, Doctor, you are a member of a subcommittee.

THE WITNESS: Correct.

JUDGE FREEDMAN: Have you participated in the authorship of any of these statements?

THE WITNESS: On Exhibit 4, I was one of the authors, yes.

JUDGE ALDRICH: Would you state your grounds, counsel, for objection?

MR. BEHAR: This witness, I believe —

[24] JUDGE ALDRICH: We are talking about Exhibit 2.

MR. BEHAR: Well, as far as both 2 and 3 go, he has not authored them. He has testified they do not concern minors, and so in our view they are irrelevant. We submit they are hearsay.

JUDGE ALDRICH: Well, I suppose if you wish to press the hearsay argument that they are not identified, there would be some initial trouble right there.

MR. BEHAR: My point is that we cannot question the guide lines.

JUDGE ALDRICH: You do not mean that they have not been identified as a statement of the American College but your hearsay argument went deeper than that.

MR. BEHAR: Yes, your Honor.

JUDGE ALDRICH: Do you object to the identification?

MR. BEHAR: I accept that he has identified these as statements of the American College but that is the limit to what I acknowledge.

MR. LUCAS: We are offering them as such, as evidence of prevailing medical standards, as some evidence of prevailing medical standards.

[25] JUDGE ALDRICH: What do you say to the fact that they do not deal with minors?

MR. LUCAS: The fact that they do not advocate parental consent would tend to show that parental consent was not medically justifiable, and we will question the witness in more detail on that.

JUDGE ALDRICH: Where is the reference to parental consent?

MR. LUCAS: In the Statement on Abortion there is none.

JUDGE ALDRICH: How do we know it relates to minors?

MR. LUCAS: We would say that the absence of any reference — you see the Statement on Abortion has certain requirements and certain restrictions which does not include the restriction on requiring parental consent. This was one way in which the Supreme Court used various standards in Roe v. Wade and Doe v. Bolton, the absence of parental consent in the Modern Penal Code and the Uniform Abortion Act, we feel would be evidence of lack of medical basis for requiring this. Both Exhibits 2 and 3 are useful as medical background to the subject matter and would be useful in that regard.

JUDGE ALDRICH: We can have that direct [26] from the witness. Exhibits 2 and 3 are excluded.

Q Dr. Sturgis, would you describe —

JUDGE ALDRICH: We are considering Exhibit 4.

MR. LUCAS: I am sorry.

JUDGE ALDRICH: Exhibit 4 will be received limited to the statement being the doctor's own views.

MR. REYNOLDS: May I be heard on that, your Honor? I do not have a copy of Exhibit 4.

JUDGE ALDRICH: I thought it was passed to counsel.

MR. REYNOLDS: It was passed and taken back.

JUDGE ALDRICH: Please take a look at it. I might suggest to you, counsel, that it will save time to put in the document rather than ask individual questions. You are going to have plenty of opportunity for cross examination.

MR. REYNOLDS: If your Honor please, my point was that if the doctor is going to be using this as his testimony it would be helpful if I had a copy in front of me.

JUDGE ALDRICH: I agree with that. But you would not have a copy of his testimony if he [27] testified without it.

MR. REYNOLDS: No, sir, I would not.

JUDGE ALDRICH: Therefore, I overrule the objection.

MR. REYNOLDS: Kindly note my objection to the ruling, your Honor.

JUDGE ALDRICH: You don't have to note your objection in this Court.

MR. REYNOLDS: May I inquire which portions of this exhibit would be accepted?

JUDGE ALDRICH: We understood this was a statement the witness subscribed to and we were receiving it as a recitation of his personal views.

MR. REYNOLDS: May the record show I object to the introduction of it.

Q Dr. Sturgis, would you describe what your findings were in your work on this committee, that is, Exhibit 4?

A The conclusions there of the subcommittee to which I agree were that, first, the minor who is pregnant and refused to tell her parents should be urged as far as possible to bring the parents into the situation since, of course, all minors have a certain degree of financial and emotional dependence on their parents. However, if this was completely [28] impossible, and if the child was adamant in her refusal that puts the doctor into a very different predicament, and we felt that to send the child away without helping her at all was the worst choice, and that to betray her confidence and say, "All right. I'm going to tell your parents on you," was just as much a violation of confidentiality that a lawyer might find himself in with his client, and this was unacceptable to us.

The third possibility then remained, that we should try to consider the medical predicament and the medical reasons for interruption of this minor and use our judgment then concerning her maturity and development, recognizing, I think, that age is no criterion of development and maturity, that each individual must be judged by the doctor, by the man most qualified perhaps to judge the degree of maturity and responsibility as well as the medical need for help.

Q Could you describe to the Court what has been the extent of your experience with minor patients under age 18 who are pregnant, the experience which you personally have had or supervised?

JUDGE JULIAN: I would ask that your testimony be divided into a group of young women [29] between the ages of 16 and 18 and a group of young women between the ages of about 12, when conception becomes possible, and 16.

THE WITNESS: I will try to do so, your Honor, although I do not have a breakdown in statistics. I have been closely allied to a clinic in a neighborhood of Boston where legal

abortions are done after proper counselling and concern, and I think in this clinic we see around 10 percent of our clients under 18 probably and three-quarters of them over 15.

JUDGE JULIAN: Under 16?

THE WITNESS: Under 16, yes.

JUDGE JULIAN: The reason I ask is under Massachusetts law carnal knowledge of a girl under the age of 16 constitutes a felony punishable by a sentence up to life imprisonment.

THE WITNESS: Of course, according to the present law —

JUDGE JULIAN: I am referring to a girl under the age of 16 who is the victim of statutory rape.

THE WITNESS: We do have, of course, numbers of girls under 16, and they must come in with one or the other parent who signs a release.

[30] JUDGE JULIAN: Under what circumstances is that required?

THE WITNESS: I believe it is required under the law of Massachusetts.

JUDGE JULIAN: Under what circumstances would the doctor require the signature of a parent?

THE WITNESS: For any minor under 18.

JUDGE JULIAN: Under 18?

THE WITNESS: Yes. That is in our clinic — I believe that is what is understood.

MR. LUCAS: That clinic is not in this County. The District Attorney from that County has not yet been joined as a defendant in the action.

JUDGE JULIAN: I don't think that makes any difference.

Q Would you continue describing your experience with the medical and psychological aspects of unwanted pregnancies with minors under 18? You might describe the variations with age.

A The younger the girl who is pregnant the higher the risk of that pregnancy. This is well established in terms of prematurity, toxemia, and so forth, and in terms of first pregnancy as well. So that from 12 on indeed the risks, the medical risks of continuing the pregnancy do lessen but at 16 again [31] one must recognize that some 16 year olds are physically and mentally only 12. It is an individual matter.

Similarly I think the trauma of the unwed minor carrying through with the pregnancy, absence from school and the emotional isolation of this youngster from all her peers is a very great problem for her as well as her parents.

Q Yes. In your opinion as a class can minors who are at age 17, for example, give an informed consent to an abortion procedure?

JUDGE JULIAN: A little louder. I can't hear you.

Q In your opinion can minors of age 17 as a class give an informed consent to an abortion procedure?

JUDGE JULIAN: What age?

MR. LUCAS: Age 17.

MR. BEHER: Objection.

JUDGE ALDRICH: Go ahead.

A In my opinion there is no doubt at all that at age 17 most of our youngsters these days are thoroughly able to give an informed consent, and perhaps it is worthwhile to say from a medical point of view their knowledge of the situation is just as good and as broad as their knowledge of venereal disease for [32] which they can now obtain medical treatment without parental consent as a minor.

Q What has been your experience with the ability of 16-year-olds to understand the nature and consequences of an abortion procedure?

A I think —

MR. BEHAR: I object for the record.

JUDGE ALDRICH: You may answer.

JUDGE JULIAN: Do you have an opinion, first of all?

THE WITNESS: Yes.

A I think that at 16 a great majority of the girls certainly would be able to give an informed consent. But the age level is not what a doctor regards as the way to judge whether this individual or that individual should have responsibility for their medical treatment.

Q Do you have an opinion as to whether or not a minor who is 15 could give an informed consent?

MR. BEHAR: Objection.

JUDGE ALDRICH: The question is whether a minor could?

MR. LUCAS: Yes, sir.

JUDGE ALDRICH: That is a rather narrow question.

[33] Q Perhaps I should ask: What has been your experience with the ability of 15-year-olds to give an informed consent?

JUDGE ALDRICH: Has he had any experience? He deals with a clinic which requires parental consent.

MR. LUCAS: The consent of one parent is required. The fact that parents do consent would not necessarily indicate that the minor was incompetent to consent for herself. That would be our position.

We would just like to ask questions about the ability of minors at different ages to understand the nature of the procedure and to give an informed consent to try to establish if age is rationally related to the procedure.

JUDGE ALDRICH: We exclude that question.

Q Doctor, are there any medical reasons for categorically denying an abortion to persons under the age of 18?

A No, sir, I don't think so.

Q Does age have any relationship to the medical needs of a patient with an unwanted pregnancy?

A As I stated before, the younger the child the higher the risk with an unwanted pregnancy.

Q Are there any psychological reasons why a person under age 18 should be denied an abortion procedure?

[34] MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

MR. LUCAS: I think the witness testified that a great deal of his experience in the gynecological area —

JUDGE ALDRICH: Excuse me. Counsel, you should first ask the witness whether he has an opinion and then, in this instance, we would like to hear what the basis of it is, if he has any.

Q Do you have an opinion as to whether there are any psychological reasons for withholding an abortion from a person under 18?

A Yes, I suppose so.

Q What is the basis for your opinion in this field?

MR. BEHAR: Objection.

JUDGE ALDRICH: He may give the basis for his opinion.

A My opinion would be that —

JUDGE ALDRICH: No. On what basis do you rely?

Q What basis in your experience, in your clinical experience, for example, do you rely on?

A Well, my opinion would depend on a quite close experience with these young people from the age of 13 to 16 in their reaction to a pregnancy, in [35] their emotional reaction, and I think I have a fair amount of experience in that.

Q And would your opinion be as to whether there would be any psychological reasons for withholding an abortion procedure?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: We will allow this answer but on the limited basis of your own observations. In other words, you

have not been qualified, as I understand it, in general psychiatry. You have observed these children. You can tell us what you have observed about their emotional state before and after.

A My experience would indicate that in the vast majority of cases these young people are tremendously relieved. I have to say that in my experience I can think of one situation where perhaps psychologically with psychiatric help it might have been urged that an abortion was not done. I am not a psychiatrist, your Honor. In any ambivalent situation I would run to get help from an expert. It could be that once in a while there might be a reason psychiatrically for continuing the pregnancy but this is very rare.

Q Have you personally had any specific training in the [36] psychological aspects of adolescent pregnancy?

A No formal training, no.

Q Have you studied the subject as an academic matter?

A Only insofar as I was interested in reading the literature.

Q Have you read the literature on the psychological aspects of unwanted pregnancy among minors?

A I suppose I have read most of the current literature.

Q Do you read the psychiatric literature in that field also?

A Not now. When I was an editor of a psychiatric psychosomatic journal I used to.

Q Do you have an opinion as to whether there are instances in which there are positive reasons why parents should not be involved in the minor's decision to have an abortion?

MR. BEHAR: Objection?

MR. REYNOLDS: Objection.

MR. BEHAR: Our objection goes to the qualifications, first.

JUDGE ALDRICH: Let's hear what basis you have for an opinion. We are not asking for the opinion, but your qualifications to express it.

JUDGE FREEDMAN: First of all, do you have an opinion?

[37] THE WITNESS: Yes.

JUDGE FREEDMAN: What is the basis for your opinion, without giving us the opinion?

THE WITNESS: I would have to rely on my answer to the previous question. It would just be my experience with a lot of these young people dealing with their problems.

Q Let me ask you one further question on your background and experience. Is it routine practice for gynecologists to also deal with the psychological aspects of adolescents?

A Mr. Lucas, I wish there were more gynecologists who did this. It should be part of the discipline. Unfortunately I am afraid a lot of gynecologists have other surgical interests in mind.

Shall I now answer?

JUDGE ALDRICH: No. We haven't asked what your opinion is yet.

Q Do you have an opinion as to whether or not parental involvement in the minor's decision is necessarily helpful in every case?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I couldn't hear you. Would you please speak up?

[38] Q Do you have an opinion, and this is a slightly different issue, do you have an opinion as to whether or not parental involvement is necessarily helpful in every case of a minor who is pregnant and under 18?

JUDGE FREEDMAN: Helpful to whom?

MR. LUCAS: I suppose I mean helpful to the clinical evaluation of the minor's problem.

A Yes, I do.

JUDGE ALDRICH: And your basis for that is your experience?

THE WITNESS: As before stated it would be my experience with these young people and their parents.

JUDGE FREEDMAN: Could you give us a rough estimate as to the number of cases you have personally observed?

THE WITNESS: In the last 25 years or 30 years —

JUDGE FREEDMAN: Are you talking about the hundreds or the thousands?

THE WITNESS: Oh, no, I suppose in the hundreds. That would include my experience in the clinics, too, hospital clinics.

JUDGE ALDRICH: You have dealt with [39] parents?

THE WITNESS: Indeed, almost inevitably when one of these questions comes up, your Honor, the parents are called in — at the moment, of course, because it is the law.

JUDGE ALDRICH: The question is whether you have an opinion as to whether in an appreciable number of instances parents increase the emotional problems? Is that your question, Mr. Lucas?

MR. LUCAS: Yes, that is the question.

MR. BEHAR: I am going to object.

JUDGE ALDRICH: He may answer.

A Occasionally when these parents that are totally inadequate in dealing with a youngster's problem — I remember a retarded mother and an alcoholic father, in a situation where the youngster in mid-teens was so desperately out of touch with her parents that to bring them into this situation merely would aggravate an already critical problem. I can also remember another case, for instance, where the mother gave her permission but said, "On no account must my husband know of this. He is a cardiac. I refuse to allow my husband to be in on this at all. I know that it would be perhaps fatal."

[40] JUDGE FREEDMAN: What about cases in which the parents do not have a physical or mental handicap or impairment?

THE WITNESS: Yes, and refuse to go along. The only thing I remember doing is calling in a social worker or psychologist or another doctor to help me try to resolve the dilemma.

JUDGE JULIAN: In most instances do they go along with the doctor or not?

THE WITNESS: I think in most instances they do go along with the doctor, your Honor. I think they depend on the doctor's opinion about the medical risks of continuing the pregnancy.

Q In your clincal practice what are some of the reasons that are given for withholding consent?

A One of the reasons would be just what I have stated — the ability to get along with one or both parents, or it might initiate a difficult cardiac situation or some other medical reason. Often enough the young person is possibly wrong. They are convinced that the parental disapproval would be something she cannot face.

Q Is it just as difficult for the patients to notify their parents as it would be for them to obtain their consent in your experience?

[41] MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q Have you ever had instances where the parents withheld consent to punish the minor?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

MR. BEHAR: I don't think he has testified that in his experience parents have withheld consent.

JUDGE ALDRICH: I can't hear you.

MR. BEHAR: I don't believe he has testified that in his experience parents have withheld consent.

JUDGE ALDRICH: The Court is in disagreement about that. You had better ask him, Mr. Lucas.

Q Have you encountered instances where the parents refused consent?

A I don't recall that right now, no.

Q Have you encountered instances where the minors refused to involve the parents?

A I personally have had no experience with that but this did come up sufficiently for the subcommittee —

MR. BEHAR: Objection.

JUDGE ALDRICH: The first part of his answer is received and the rest of his answer is excluded.

[42] Q I don't think I fully understand your answer. Let me just ask you this question about your experience. To what extent are you experienced with instances either in your practice or under your supervision where parents withhold consent or where minors refuse to get consent?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE JULIAN: You keep lowering your voice.

JUDGE ALDRICH: It is more work to listen to your questions than to rule on them.

Q Let me ask you this. Could you describe what your experience has been with minors who do not want to involve their parents in the decision?

MR. REYNOLDS: I object.

JUDGE ALDRICH: He may answer.

A What has been my experience?

Q Yes.

A I can only think of about one case personally that I remember.

Q Have you gained any knowledge from the medical literature about instances in which minors do not want to involve their parents?

A Oh, yes. I think there is a good deal in the medical [43] literature indicating this.

Q Is that the primary reasons for your opinion?

A Right.

Q Have you gained —

MR. BEHAR: I ask that the last answer be excluded. We don't know what the medical literature means.

JUDGE ALDRICH: I don't know what opinion he has given based on medical literature. I was thinking about that.

Q Have the opinions you have given so far been based in part upon your study as an expert gynecologist of the medical literature?

A Yes, sir.

JUDGE ALDRICH: I guess you will have to try to cross examine on this, counsel.

Q In your clinical evaluation of a minor patient what role do you think should be and in your clinical evaluation of a patient to what extend do you take into account the parents' views on whether or not the minor should have an abortion?

JUDGE ALDRICH: In the medical literature?

MR. LUCAS: No, in his clinical evaluation of the patient.

JUDGE ALDRICH: I understood that the [44] clinic he is involved with requires parental consent.

MR. LUCAS: The consent of one parent, your Honor.

JUDGE ALDRICH: All right.

A Yes. Of course this comes into any consideration of an abortion for a minor child. That is not only what one parent but what both parents feel, because this can be a bone of contention between the wife and husband.

Q Is it one of many factors which enters into your decision?

A Yes, it is.

Q What are some of the other factors that enter into your evaluation of the patient?

A As I mentioned before, I think that a doctor and only a doctor can hope to assess the responsibility, maturity and development of this individual who is a minor by age, who may for three or four years, however, be wholly capable of being responsible for her actions. This is the judgment that I hope very much may be reserved for the medical profession rather than litigated in the courts.

Q Do you have an opinion whether it is medically necessary in your practice to avoid parental veto [45] of the minor's decision in making your clinical evaluation?

MR. BEHAR: Objection.

JUDGE ALDRICH: In light of the fact there could be a veto by one, and he has run into that problem, to the extent he may answer.

I mean an attempted veto by one, which they do not recognize.

A As I understand your question: Does this concern the doctor?

Q The question, I think, was whether or not —

MR. LUCAS: Could you read back the question?

(The following question is read:

"Q Do you have an opinion whether it is medically necessary in your practice to avoid parental veto of a minor's decision in making your clinical evaluation?")

A I think, counsel, the physician in trying to evaluate all factors has to take into account the possibility that parental veto may disturb, if you will, the whole situation. It is one of the factors that has to be taken into account.

Q Does parental veto interfere with the exercise of [46] your medical judgment?

A It is possible.

MR. BEHAR: I ask that that go out.

JUDGE ALDRICH: That may go out.

Q Would you distinguish between the mandatory parental consent and involvement of parents in the decision-making process?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE FREEDMAN: Would you rephrase your question?

Q In your evaluation of the patient would you distinguish between involving the parents in the decision as opposed to giving parents control over the decision?

JUDGE ALDRICH: Evaluating the patient for what?

MR. LUCAS: As to whether to go forward with an abortion for the patient, a patient under 18, of course.

JUDGE ALDRICH: The question is whether he would give weight to the fact one parent would disapprove?

MR. LUCAS: Whether he would distinguish the problem of possible parental veto from the problem of possible parental involvement.

[47] MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: We do not understand that question. I thought I put it clearly — immodestly.

Q Would parental involvement be as much an interference in the physician's role with the minor patient as parental veto?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Can't you put the question just simply whether it makes a difference in his decision as a general proposition if one of the parents says that he is unwilling or she is

unwilling to consent, or do you mean something more than that?

MR. LUCAS: I am trying to distinguish between the problem of notifying and involving the parents on a case-by-case basis as opposed to the parents having an absolute veto in every case.

JUDGE FREEDMAN: I question the worth of this question to your case, counsel, for the simple reason that I thought the doctor had explained that in only one case does he recall one parent vetoing what the other parent had already given, that is, consent.

MR. LUCAS: He also testified as an [48] expert about the broadest scope of the problem. Certainly expert witnesses often testify about things which they do not have any direct clinical experience but have expert knowledge.

I will withdraw that question and I will ask this final question.

Q Can you think personally of any rational reason whatsoever for requiring the consent of both parents in the case of every minor under 18 who is pregnant and seeks an abortion?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: That is much too broad.

Q I believe I asked you earlier about the medical and psychological reasons. I think I will not pursue that question.

MR. LUCAS: I don't think I have any further questions of this witness at this time.

JUDGE ALDRICH: We will take a recess before the next witness and counsel for the defendants can decide whether they wish to make a partial cross examination at this time.

(Recess.)

MR. BEHAR: The defendants reserve their cross examination, your Honor.

[49] JUDGE ALDRICH: Very well.

MR. LUCAS: I would like to call as our second witness Dr. Jane E. Hodgson.

JANE E. HODGSON, Sworn
Direct Examination by Mr. Lucas.

Q Would you state your name and current address, please?

A Jane E. Hodgson, 1537 North Fisk Street, St. Paul, Minnesota.

Q What is your current position, Doctor?

A I am associate professor of obstetrics and gynecology at the University of Minnesota, a full-time teaching appointment at St. Paul's Ramsey's Hospital.

Q Are you licensed to practice medicine in the Commonwealth of Massachusetts?

A I am.

Q Are you licensed in any other places?

A In Minnesota, in the District of Columbia, Kansas and Missouri.

Q Where did you do your residency training in Ob/Gyn?

A Mayo Clinic, Rochester, Minnesota.

Q Do you have your Ob/Gyn boards and in what year did you get those?

[50] A In 1949.

Q How long have you been practicing in Ob/Gyn?

A Since 1947.

Q Have you written articles about obstetrics and gynecology and subjects within those fields?

A I have.

Q Have you attended medical educational conferences in Ob/Gyn?

A Frequently.

MR. LUCAS: May I have the curriculum vitae marked.

THE CLERK: Plaintiffs' 5 for Identification.

(Curriculum Vitae of Dr. Jane E. Hodgson marked Plaintiffs' Exhibit 5 for Identification.)

MR. BEHAR: Your Honor, could we have some sort of agreement that counsel will provide the defendants with copies of exhibits 1 and 5 and also 4?

JUDGE ALDRICH: Yes. The Court would like to have three copies of Exhibit 4. We do not need three copies of Exhibit 1 and Exhibit 5.

MR. LUCAS: I would be glad to do that. I only received the exhibits this morning or we would have had copies.

[51] JUDGE ALDRICH: All right.

Q Would you identify Exhibit 5, please?

A This constitutes a record of my various post-graduate education, my memberships in various medical societies and awards and a bibliography of the articles I have contributed to the field.

MR. LUCAS: We would like to move the admission of Exhibit 5 into evidence as evidence of Dr. Hodgson's background and experience.

JUDGE ALDRICH: Yes.

(Plaintiffs' Exhibit 5 for Identification received in evidence.)

Q Dr. Hodgson, would you describe the extent of your experience in dealing with adolescent gynecological patients?

A As a woman gynecologist since 1947 I think I have seen more than my share of adolescent gynecological patients simply because they seek out a woman or their parents seek out a woman. As medical director at Pre-Term Washington, at the Free-Standing Abortion Clinic I have served there for

almost two years, during which time I supervised over 25,000 first trimester abortions. At the time I left Pre-Term the percentage of patients under the age of 18 that were being treated constituted approximately 11 [52] percent. In Minnesota I have been watching and I have been aware of the increase in this age group that are problem pregnancies, and I have been very much concerned to note that within the last 100 patients that have sought help at the University of Minnesota, 20 percent of these were under the age of 18. For the last 600 patients, however, it would constitute about 13 1/3 percent. This is a rising percentage. It is alarming.

MR. BEHAR: I move that that go out.

JUDGE ALDRICH: Rising percentage.

Q Would you finish describing your experience with adolescent patients or have you completed that description?

A I have completed the description.

Q You also have two teenage daughters, don't you?

A I have one teenage daughter and one who is older, 25.

Q So you are an experienced parent?

A Yes.

Q Have you practiced at all in Massachusetts?

A I have served as a consultant here on several occasions for two of the Free-Standing Clinics in the city here.

Q Did you train any physicians in the medical aspects [53] of abortions at those clinics?

A Yes.

Q Did you train them at all in the psychological aspects of evaluating patients?

A Hopefully.

Q Are the psychological aspects of evaluating patients a part of your practice, your clinical practice?

A It almost has to be.

JUDGE JULIAN: Would you read that question?

(The following question was read:

"Q Are the psychological aspects of evaluating patients a part of your practice, your clinical practice?")

THE WITNESS: I would hope so.

Q Is this delegated to the paraprofessional counsellors also?

A It is delegated to paraprofessional counsellors but the doctor of necessity must play a very important role, a key role actually, in supervising the counselling and taking part in the problem cases.

Q What role, if any, have psychiatrists played in the psychological evaluation at the clinics you have had experience with?

A A very active role.

Q Is this on a day-to-day basis?

[54] A Yes.

Q How many patients or what percentage of patients are evaluated actively by psychiatrists in the Free-Standing Clinics you have had experience with?

A It would be difficult for me to say the percentage but they are in constant touch with the operations of the clinic and are contacted with a number of the problem cases. I could not give you an accurate percentage as to the incidence of consultation but they are kept on a retainer basis.

Q Would you describe for the Court some of the medical difficulties encountered by pregnant minors under the age of 18 in your practice?

A Would you repeat that question?

Q Would you describe for the Court the medical problems, if any, encountered by minors under the age of 18 in your clinical practice who are pregnant?

A The medical problems always are increased in this age group. This has been pointed out repeatedly in the literature

and in my own experience. There is the risk of toxemia and premature labor, hemorrhage, Cesarean section, neo-natal mortality, even maternity mortality is much higher in this age group.

Q Do minor patients under the age of 18 who are [55] pregnant encounter any particular psychological problems in your experience?

A No more than any other group.

Q Are you experienced with the effect on the family of a teenage pregnancy in your clinical practice?

A Teenage pregnancy is very disruptive in the family.

MR. BEHAR: Objection. The answer is unresponsive.

JUDGE ALDRICH: I think that is close enough.

Q Would you describe the manner in which it is disruptive?

A An unwanted pregnancy in a teenager is extremely complicated. The social and psychological problems are many. The youngster usually has to give up an education or there is a question of financial support. There is a question of illegitimacy. There is the question of the increased medical risks. All of these things enter into a teenage pregnancy.

MR. BEHAR: I am going to ask that the answer be stricken as there has been no foundation laid for it.

JUDGE ALDRICH: Denied.

Q To what extent have you dealt with patients who were [56] minors under the age of 18 who have had any difficulty or unwillingness in getting parental consent for an abortion?

A Would you repeat that?

Q What has been the extent of your experience with minors under 18 who had difficulty getting parental consent?

A Actually we do not see that type of patient. They don't get to the qualified clinics. If they are unable to get parental consent, and they usually are determined to have the termination, they will seek help elsewhere and they will go to some of

the unqualified centers or criminal abortionists. So that our actual contact is very small with that group of patients.

MR. REYNOLDS: I object.

JUDGE ALDRICH: Is your objection: Does the lady know whether they go to other places? Or what is your objection?

MR. REYNOLDS: Her answer went further than the question. My understanding of the question was she was talking about her experience.

JUDGE ALDRICH: Well, unless there is something wrong with the next question it is a great waste of time to make the question be asked twice. [57] If she is not qualified to give it, that is a very sound objection.

MR. BEHAR: There is no foundation for the rest of the answer, no personal knowledge.

JUDGE ALDRICH: I will sustain it on that basis but not on the ground it is not responsive.

Q Do you have any basis for knowing what patients do who do not get parental consent and do not want to involve the parents?

A Yes. I have been asked this question from a number of clinics throughout the country. Just last week, for example, in Missouri I was in Columbia as a consultant for the Planned Parenthood Clinic there, and I asked them what they do about the parental consent requirement under the Missouri law where the patients were unable to obtain consent, and they said that they just simply —

MR. BEHAR: Objection. This would be hearsay.

JUDGE ALDRICH: It seems to me to be part of the lady's qualifications.

MR. BEHAR: I believe she said that the clinics were in Missouri, and she is experienced with people in Minnesota and her clinical experience, which would present a problem.

[58] JUDGE FREEDMAN: She testified that in various sections of the country she has attempted to get conclusions and based upon her experience and what she has obtained elsewhere this is what she is now elaborating on.

MR. BEHAR: There is no tie-in between the patients that she is talking about and her clinical experience.

JUDGE ALDRICH: You may answer.

MR. LUCAS: Would you read the question?

(The following question was read:

"Q Do you have any basis for knowing what patients do who do not get parental consent and do not want to involve the parents?")

JUDGE ALDRICH: She did answer that question. Had you finished your answer, Doctor?

THE WITNESS: No, I had not. I was just about to say what happened to these patients. They went elsewhere simply because they were referred elsewhere by the various clinics who refused to accept them without parental consent. They are told where they can go and have the procedure done without parental consent. In other words, the law is being broken all over the country where there is [59] such a law.

Q Was this part of the ordinary clinical practice you observed while you were in Columbia?

A Yes, and the same thing exists right in St. Paul, Minnesota.

Q Are you familiar also with the ability or inability of minors to understand the nature of an abortion procedure and to give an intelligent consent to such a procedure?

A I don't think chronological age enters into the problem except the very immature or the sub-normal, mentally sub-normal individual.

MR. REYNOLDS: I move that that go out, if your Honor please, as not responsive.

JUDGE ALDRICH: That is based on your personal observations, Doctor?

THE WITNESS: That is right, sir.

JUDGE ALDRICH: All right.

Q Do you have an opinion as to whether or not a 17-year old is capable of giving an informed consent to abortion as well as an 18-year-old — I mean 17-year-olds as a class?

MR. BEHAR: Objection.

JUDGE ALDRICH: The question is whether she has an opinion. Do you? Not what it is, but [60] do you have an opinion?

THE WITNESS: Yes, your Honor.

JUDGE ALDRICH: And the basis for that is what you have told us or is there something else?

THE WITNESS: On the basis of my personal experience.

Q Do you include in that basis the experience you have supervised also?

A Yes.

Q What is your opinion as to the ability —

JUDGE ALDRICH: Does this question relate to all or some or many or what?

MR. LUCAS: To 17-year-olds as a class.

JUDGE ALDRICH: Well, there can't be a total class, can there?

MR. LUCAS: No, but the statute does as a class require all persons under 17 to obtain parental consent of both parents. Then I would ask for some details about the specific experiences.

MR. BEHAR: We object to the question and answer.

JUDGE ALDRICH: Mr. Lucas, let's have a more specific basis. How many 17-year-olds has she had this problem with?

Q Approximately how many 17-year-olds have been patients [61] at the clinics where you have had your experience? Can you give us a rough estimate of that?

A It would be at least 2500 under the age of 18 but I could hardly break those down. I'm afraid I couldn't tell you the number of 17-year-olds in that group.

Q But you know how many are under 18?

A Yes.

Q Do you not have any breakdown on it year by year?

A There is a breakdown but I cannot quote it to you.

Q Do you regard the year-by-year factor as being even relevant in the minor's case?

A No, I do not.

JUDGE JULIAN: Doctor, do I understand you to say that there is no significant difference between a 13-year-old pregnant girl and a 17-year-old adolescent in this matter?

THE WITNESS: I think the maturity of the individual depends —

JUDGE JULIAN: I mean generally.

THE WITNESS: Would you mind repeating that, your Honor?

JUDGE JULIAN: You said that there is no significant difference among pregnant girls under the age of 18, which I assume meant that whether they were 12, 13 or 14 or 17 or 18 it made no [62] substantial difference with respect to this.

JUDGE ALDRICH: With respect to their ability to consent. I think that was the question.

THE WITNESS: I think that many other factors enter into their ability to deliver an informed consent, their social condition, their strata in society, their education, their emotional maturity. All these factors are so different that some 12-year-olds will be more mature than 18-year-olds.

JUDGE JULIAN: I understand that. We are not dealing with exceptions. That is why I asked you as a group.

THE WITNESS: As a class undoubtedly the immaturity would be more remarkable in the 12- or 13-year-olds, yes.

JUDGE JULIAN: What do you mean by more remarkable?

THE WITNESS: They would be more in need of parental support.

Q What percentage of 17-year-olds would you say are capable of giving an informed consent in your experience?

A The vast majority.

Q Is there any particular age at which a minor becomes [63] incapable of giving an informed consent in your experience?

A No.

Q Have you ever encountered a 13-year-old capable of giving an informed consent?

A I have.

Q Have you ever encountered a 19-year-old incapable of giving an informed consent?

A I have.

Q Do you consider age just one of many factors in that decision?

A Right.

Q Doctor, have you been a candid advocate of elective abortion in your experience in the last several years?

A I have.

Q Were you the principal party in a court case, which I have given the Court earlier, that overturned the Minnesota law that was passed this year?

A Right.

Q Were you also the principal party in a challenge to the old Minnesota law back in 1970?

A Right.

Q Was this a case where you performed an abortion on a particular patient in violation of the law?

[64] A I did.

Q Did this result in the law being overturned?

A Yes.

JUDGE JULIAN: How high up did that go? Would you give me the citation?

MR. LUCAS: 204 Northwest 2d 199. I do have extra copies of this.

JUDGE JULIAN: What is the title of the case?

MR. LUCAS: State v. Hodgson.

Q Did either of those cases have anything to do with parental consent?

A No.

Q Is there a law on the books anywhere where you practice now which requires parental consent?

A Not to my knowledge. May I add that it is required, however, at the institution where I work and it is enforced.

Q Does this interfere with your practice there?

A It concerns me, yes, it does.

JUDGE JULIAN: It concerns you or it interferes with you?

THE WITNESS: Yes, it interferes.

Q Have you reviewed the parental consent requirement in the recent Massachusetts law?

[65] A I have.

Q Would it be your understanding of that as a clinical practitioner that it requires the consent of both parents?

A Yes.

Q Would you understand that to allow any exceptions, other than an emergency?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q Dr. Hodgson, do you have an opinion as to whether there are any medical reasons for categorically denying abortions for all minors under age 18?

MR. BEHAR: Objection. There has been no evidence abortions are being categorically denied to minors?

JUDGE ALDRICH: She may answer.

Q Do you have an opinion? Just yes or no.

A Any medical reason?

Q As to whether there are any medical reasons for categorically denying abortions for all minors under age 18 who cannot get parental consent?

A I know of none.

Q Do you have an opinion as to whether there are any psychological reasons for denying abortions to [66] minors under 18 who cannot get parental consent?

A I know of none.

MR. BEHAR: Objection. She was asked whether she had an opinion. She did not answer yes or no.

JUDGE ALDRICH: We ruled on your objection to the substance and it is overruled.

Q In your experience have there been any cases where there were affirmative reasons in your opinion for not informing the parents of the pregnancy? I am just asking about your experience now without a specific opinion. Have you encountered cases where there were positive reasons why the parents should not be told in your opinion?

A This happens rather frequently, yes.

Q Could you describe some of these cases?

A Illness on the part of the parents where the concern would be so deep, as Dr. Sturgis cited, cases where patients are concerned over their father's coronary status or their mother's emotional illness, alcoholism, marital instability, instability in the home, marital discord. All these things are factors in keeping them from communicating with their parents.

Q Have you also encountered situations where parental [67] involvement would be helpful?

A Yes, indeed. I encourage it in every instance. I think it is extremely important and to be sought after but there is the rare case where it is impossible to obtain.

Q Is it even more difficult when you have to obtain the consent of both parents?

A It simply is an added impediment to the treatment of the patient.

Q Could you make any kind of statement as to what particular kinds of family situations there are when parental consent is difficult to obtain?

MR. BEHAR: I object. I believe she testified that she does not treat patients unless she has parental consent. I am not clear what we are really talking about, what the answer is predicated on.

JUDGE ALDRICH: With that explanation, Doctor, can you answer the question?

THE WITNESS: Sometimes we see the patients and have to refuse them because they fail to obtain parental consent.

We know what they are going to do. So I do have personal contact with that group of patients.

Q What are some of the reasons the parents give for [68] withholding consent and the instances of your experience and where you have supervised?

A Usually it is of a religious nature or they are urging the child into an early marriage. It is usually a matter of morality. They want to conform to society's standards. Illegitimacy is something they dread. Many of these youngsters are forced into early marriages.

Q Do you encounter instances where the parents try to force the minor to have an abortion?

A Yes. I have encountered that a number of times where I felt it was for the welfare of the patient that they continue the pregnancy, if it is their wish to do so, and if there are logical reasons for continuing the pregnancy. As a rule the tendency in these days is for parents to wish to influence the child to terminate the pregnancy rather than the other way around.

May I cite an example? Just last week I had a patient, an Indian girl, age 14, who came from a reservation up in northern Minnesota where her education had been completed, and she was ready to get married, and her boy friend was very supportive, and they wanted to continue the pregnancy but they had been almost coerced into coming down to St. Paul [69] to be aborted, and we refused this patient, and she is continuing her pregnancy.

We encounter this type of thing fairly frequently where a mother refuses to believe that her daughter is mature enough for responsible motherhood and marriage.

Q Are there any national medical standards about the desirability of requiring parental consent, any medical opinions as opposed to legal opinions?

A It is impossible, I think, to develop any standards because each case is an individual problem and has to be evaluated on its own merits. That is why legislation is so difficult.

Q Have you written any articles on the subject of abortion?

A Several.

Q Have you recently published a study of complications in first trimester abortions?

A I have.

MR. LUCAS: May this be marked as an exhibit?

(Study of Complications in First Trimester Abortions marked Plaintiffs' Exhibit 6 for Identification.)

Q Is this a copy of an article you recently published?

[70] A It is.

MR. LUCAS: We would like to offer this into evidence.

JUDGE ALDRICH: Have you given copies to your brothers?

MR. LUCAS: Yes, I have. We would like to offer this as evidence of Dr. Hodgson's experience, clinical experience.

JUDGE ALDRICH: We are waiting for you to show copies to your brothers.

MR. LUCAS: I have given them copies.

JUDGE ALDRICH: I am sorry.

MR. LUCAS: Would you mark this as an exhibit?

(Communication to Minnesota Medicine on the subject of Teenage Mothers marked Plaintiffs' Exhibit 7 for Identification.)

Q Is Exhibit 7 a communication to Minnesota Medicine that you wrote on the subject of Teenage Mothers?

A Right.

MR. LUCAS: We would like to introduce this also into evidence as part of Dr. Hodgson's experience and qualifications.

MR. BEHAR: As far as the study goes there seems to be no breakdown relative to minors [71] on this. It seems to be a rather undifferentiated study. Primarily on that basis we would object to it.

The witness is here in court I assume on the question of the challenged statute. I fail to see how this relates to that.

As to the letter, I think it is totally self-serving. She is here and can testify.

MR. LUCAS: We have introduced them for the limited purpose of showing her experience.

JUDGE ALDRICH: Six and seven are out.

Q In your clinical experience does the fact that a minor patient is going to pay for an abortion enter into your decision whether or not to abort her? Does the profit motive enter into your decision in your practice?

A I hope not.

JUDGE JULIAN: Her own individual practice?

MR. LUCAS: Yes.

Q Do you feel there is any conflict of interest between you and the patient when you are evaluating her from a financial standpoint?

A If there were it would behoove me to encourage them to continue their pregnancy because an obstetrical fee [72] is certainly or is usually higher than a pregnancy termination fee.

JUDGE JULIAN: That would be provided the patient intended to have the same doctor as her obstetrical expert and not for the purpose of aborting her.

THE WITNESS: I perform obstetrics as well.

Q Would you regard it as unethical to encourage the patient to go through with the pregnancy for the purpose of getting a larger fee?

A Obviously.

Q Does the concept of abortion on demand mean anything to you medically?

A I have considered it a very inflammatory term which has been used by the opposition of abortion law reform to arouse the medical profession, I think, more than anyone.

Q Is the availability of elective abortion accepted by the national medical organizations in Ob/Gyn?

A Yes.

MR. LUCAS: I think I have no further questions.

JUDGE ALDRICH: Thank you, Doctor.

MR. BEHAR: We would reserve cross [73] examination of this witness, your Honor.

MR. LUCAS: Dr. Carol Nadelson. We would like to call her as our last expert witness.

CAROL NADELSON, Sworn
Direct Examination by Mr. Lucas

Q Would you state your name and address.

A Carol Nadelson, 30 Armory Street, Brookline, Mass.

Q What is your current position, Doctor?

A I am assistant professor of psychiatry at Harvard Medical School and associate psychiatrist at Beth Israel Hospital in Boston, and director of medical student education for the psychiatry department at Beth Israel Hospital.

Q Would you tell the Court what your educational background in this field has been?

A I received my M.D. degree from the University of Rochester in 1961. I subsequently interned in medicine at the University of Rochester Hospital. I subsequently came to Boston and had two years of psychiatric residency training at Massachusetts Mental Health Center and two additional years at Beth Israel Hospital and I have been on the staff since that time.

[74] Q What has been your experience with evaluating adolescent patients, female adolescent patients?

A The greater percentage of both my teaching and clinical practice has been devoted to adolescents not involved in any way with pregnancy. A significant percentage — for a period of several years when I was liaison psychiatrist for the obstetrics and gynecology department — was devoted to evaluating pregnant teenagers.

Q Are you licensed to practice in the Commonwealth of Massachusetts?

A Yes.

Q What has been the extent of your experience with evaluating teenagers who are abortion candidates?

A Well, up until last year I either saw personally or supervised and consulted on every teenager who was aborted or

who asked to be who came to the Beth Israel Hospital. Prior to that, I guess it was 1971, I was involved mostly with the direct evaluation. I was not responsible for the program. At that point I directed the program and was responsible for evaluation and decision-making.

Q Would you describe in your experience what the impact of an unwanted pregnancy is upon a person under age 18?

[75] A Most of the youngsters we see at the time we see them — and I might add we usually see them on referral from some other agency or on self-referral, and we see them after they have already had the diagnosis of pregnancy made, and they tend to be generally quite upset, often non-communicative and withdrawn, sometimes very sad, anxious. The response varies with the youngster. It has a lot to do with what her previous adjustment was like and what her home situation has been like.

Q Does a requirement of parental consent ever delay the stage at which they have an abortion?

A Yes.

Q Is this hazardous in any way to the patients?

JUDGE ALDRICH: Louder, please.

Q Is this hazardous to the patient in any way, this delay?

MR. REYNOLDS: Objection.

MR. BEHAR: Objection.

A Yes.

JUDGE ALDRICH: There were two questions I never heard. What was the first one?

MR. LUCAS: The first question was whether the requirement of parental consent ever delays the patient in being scheduled for abortion.

[76] THE WITNESS: Yes.

JUDGE ALDRICH: What was your next question?

Q Whether this poses any hazard for the patient?

A Yes.

JUDGE ALDRICH: From a medical point of view?

MR. LUCAS: First medical and then psychological.

MR. BEHAR: I object on the medical.

JUDGE ALDRICH: She may answer.

A From a psychological point of view it does also.

Q In what way does it pose — does delay pose a psychological hazard to the patient?

A Well, when you have a person who is already in a crisis situation and is extremely anxious their anxiety increases and often they develop symptoms like sleeplessness, weight loss, loss of appetite, they don't want to go to school. There is a whole variety of other kinds of anxiety-related problems. Sometimes teenagers who do not have the same delay capacity that adults have will do something impulsive while waiting because they cannot tolerate their anxiety.

Q To what extent have you had direct contact with [77] teenagers who could not get parental consent?

A I have had some contact with those teenagers. In the past we would see every teenager regardless who came in, and if a teenager refused or felt she could not get parental consent we would try to explore why and try to make some assessment as to what we could do and also to encourage her to get parental consent or involve her parents. All our evaluations whenever possible do involve parents.

Q What do these patients give as reasons for not wanting to involve the parents?

A As the doctor who just testified stated, and I have had similar experiences, it is often parental illness, alcoholism, and I am talking about both physical and emotional illness. I might add something that I think is terribly important and that is that a good many of the teenagers we see in our clinic either do not have both parents available, never have, or do not know the whereabouts of one of their parents, and some of their family situations are extremely unstable.

Q What are some of the types of family situations that lead to this conflict between parents and child, the minor?

A It is variable. It depends on the group. But often a child will feel that they cannot talk to their [78] parents, one or the other of the parents do not understand, and the fear of upsetting them. They sometimes have no contact with the parents.

It is not at all infrequent that a teenager will never have seen one of her parents or have no idea where they are and they feel very disconnected from them.

The parents, on the other hand, often feel guilty and angry. They may feel punitive towards the child if they feel they have been injured by her action. And sometimes they feel they are doing the best thing and the teenager thinks something else is the better thing. So it is just a difference of opinion.

Q Do you have any experience or contact with patients after they have had abortions?

A Yes.

Q Would you describe the psychological reactions of minors under the age of 18 after having had an abortion?

A Most of the teenagers I have seen who have had an abortion feel relieved by it. They feel that they have done the right thing and have a second chance often. There are a very small percentage who feel guilty and a very small percentage that are sorry [79] about it, — really less than 1 percent in my experience. Most teenagers feel that they are better off afterwards than they were before or in fact many of them feel, and it is certainly evident clinically, that they have grown from the experience, especially if it is handled properly.

Q Do you have any experience with the effect of continuing the pregnancy on these minors?

A Yes. We have a teenage clinic at the Beth Israel where youngsters who want to continue their pregnancy are seen, and the problem that tends to arise is that the time of delivery

most of the youngsters we see want to keep their babies. They do not want to give them up for adoption.

It is becoming more and more usual for youngsters to want to do that, and they get into sometimes serious difficulty in terms of their maturity and in taking care of their baby. If they come from a stable family they can get some help sometimes but most of the teenagers we see do not come from stable families, and it is difficult for them to get help, and it is very difficult for someone who is still a child to have a child and bring up a child.

JUDGE FREEDMAN: Do you often get repeat [80] patients?

THE WITNESS: Yes.

JUDGE FREEDMAN: They have been aborted and have come back again?

THE WITNESS: Yes. I cannot quote the exact figures but it does not seem to make much difference about whether they have had an abortion or a pregnancy carried to term. The repeat rate is high in either case.

Q Do you have an opinion, yes or no, as to the ability of a person under 18, a minor pregnant, a minor under the age of 18, to give an informed consent for an abortion procedure?

A Yes.

Q Is this opinion based on your experience that you have previously described?

A Yes.

Q What is your opinion?

A I believe they can and do. I do feel that what is required is a very careful explanation and time in order to understand fully the implications of their decision.

Q Could you give an estimate of approximately how many, what percentage of 17-year-olds could give such an informed consent?

[81] A That is very difficult. Most of the 17-year-olds certainly are quite clear. I think the difficult time is in the 11, 12 and 13-year-olds that we see. It is much more time consuming and difficult for them to understand what it means. A teenager generally does not connect pregnancy — the events leading to pregnancy with pregnancy and with having a baby. Those three are not connected the way they are in most adults' minds.

Q With the class of patients under 13 is parental involvement a magic solution to the ability of them to understand?

A It is helpful, it is extremely helpful, and we try very hard to get everybody, the entire family, involved if we can, as many people as can sit down together and talk about it. It is not always possible.

Q Do you encounter instances of parents opposing abortions of 13-year-olds?

A Yes.

Q On what grounds?

A Well, the usual reasons tend to be religious or moral reasons, but parents sometimes will label a youngster as a bad kid and feel she needs to be punished, and that is the way to punish her, and that she will improve if she is punished. That is [82] a misguided view but it is held.

Q Is it psychologically more dangerous for a 13-year-old to go through pregnancy than to have an abortion?

A In my opinion it is but I cannot present data on it. It is a clinical judgment.

JUDGE ALDRICH: Would you read back the answer?

(The answer is read.)

Q In your opinion can a majority of 14-year-old pregnant minors give an informed consent?

A Yes.

MR. LUCAS: I have no further questions.

JUDGE ALDRICH: Thank you, Doctor.

MR. LUCAS: We do not plan to call any more witnesses. There have been depositions of Dr. Zupnick and Mr. Bill Baird and Mary Moe I. We have only gotten Mary Moe I's deposition. The others will probably be here soon. I have not had time to read Mary Moe's deposition and she hasn't. We have no further witnesses to call.

JUDGE ALDRICH: The suggestion we made a little earlier was that the continued hearing would be a hearing on the merits at which time you would commence your cross examination of the witnesses we have already heard on direct examination.

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DECEMBER 30, 1974.

[2] THE CLERK: William Baird and others v. Robert Quinn and others.

MR. BEHAR: Dr. Sturgis.

SOMERS H. STURGIS (Resumed)
CROSS-EXAMINATION BY MR. BEHAR.

Q Doctor, would you restate your name for the record?

A My name is Somers H. Sturgis. I live at 47 Raymond Street, Cambridge, Massachusetts.

Q Doctor, you indicated on direct examination that pregnancy, an unwanted pregnancy may be an emotional tragedy to a minor; is that correct?

A Yes, indeed.

Q And isn't it also the case that an abortion may prove to be an emotional tragedy for a minor in your experience?

A Of course this is so and one has to judge which —

MR. BEHAR: I move that that be stricken. He has answered the question.

JUDGE ALDRICH: The answer is yes. On the other hand, I see no reason why the witness should not be allowed to explain. It is not responsive to your question, but we might as well have it now as some other time.

MR. BEHAR: Please note by objection.

JUDGE ALDRICH: All right. Your objection is sustained. We will put the witness back on later.

[3] Q Doctor —

JUDGE ALDRICH: I don't think, I may say, that you advance the proceedings very much by this procedure.

MR. BEHAR: Very well. I will withdraw the objection.

Q Would you explain, Doctor?

A The physician must decide whether the trauma, both mental and physical, of carrying the baby to term and the labor thereof is worse or less than an abortion.

Q Isn't it the case, Doctor, that even when that decision is reached and an abortion is, in fact, performed, that operation may constitute an emotional tragedy in that minor's life?

A It is possible in some cases. This is why one counsels these children.

Q In fact, the literature is replete with cases where that has, in fact, happened; isn't that the case?

A I am not familiar with many authors of this sort, no.

Q Doctor, on direct examination your attorney and you referred to the word abortion. Do you make any distinction between first, second and third trimester abortion?

A Of course.

Q When you used the term abortion, for example, in giving your opinion that a majority of 16 year olds can consent, [4] give an informed consent to an abortion, when you used that term, which trimester were you referring to?

A In general, you refer to the first trimester as an abortion. A third trimester is a premature labor, premature miscarriage.

Q What about the second trimester?

A This may be either way.

Q When you gave your opinion, for example, that 16 year olds, a majority of 16 year olds can give an informed consent to an abortion, were you, in using the term abortion, referring to second trimester abortions?

A Occasionally, yes.

Q Isn't it a fact, Doctor, that the medical procedure is more complicated the further on in pregnancy a minor or any woman is?

A The procedure for the second trimester cases is a very simple one actually. In some ways, it is technically much simpler than a first trimester.

Q What is the standard technique for a second trimester?

A Generally, admitting a needle into the amniotic sac of the pregnancy and introducing some material, such as saline solution, that will institute a labor situation, so that the fetus is carried through as in labor.

Q But when you use the term abortion, you are not referring then to third trimester abortion?

[5] A No.

MR. BEHAR: I would ask that the witness be shown a copy of Exhibit 4.

Q You stated, I believe, that that exhibit reflects your own personal views?

A Yes.

Q Isn't it a fact, Doctor, that your personal views as reflected in that exhibit demonstrate that there are minors who are too immature to give an informed consent to an abortion?

A Would you rephrase that question?

Q Your personal views as reflected in that exhibit, aren't they such that they recognize that there are minors who are too immature to give an informed consent to an abortion?

A I would have no hesitation in not agreeing with you in that, sir, because we have always stated that the spectrum of maturity is not limited to age but to the individual.

Q And the problem exists relative to minors in the age group 12 through 17?

A Yes.

Q You have indicated that the physician is put in a problem situation where the minor will not have parental involvement, and you suggest that where parental cooperation is impossible to secure that there is a problem. Does that mean that there should be some effort made to secure parental [6] cooperation?

A Indeed, I fully feel that that is correct.

Q What should this effort consist of?

A Trying to get hold of the parents, if available, and having her and the child come together to talk to the physician.

Q Do you think it good medical practice when absolutely no effort is made to encourage parental cooperation and involvement?

A Sometimes it is impossible.

Q As a general proposition though, it is your view that an effort should be made in that direction?

A Personally, I would myself make every effort to get the parents involved, if it is possible. Sometimes the parents are not available, either one.

Q If the parents are, in fact, available, the effort should be made; is that what you are saying?

A Personally, I would feel so.

Q Exhibit 4, which reflects your personal views, indicates that in a situation where a minor refuses to involve her parents and is not found to be mature by the physician, that a doctor should not act on his own responsibility; is that your view?

A Correct.

Q Who should he draw into the process in your view in the [7] situation?

A I think anyone trained in this area. It may be another doctor. It may be a social worker or a psychologist or a psychiatrist. It may be a minister or someone who is aware of the problem and willing to work on a solution.

Q Isn't it a fact, Doctor, and isn't it accepted medical/legal practice to oftentimes draw in the courts in these situations?

A I don't happen to remember that that is the case, but I think it is mentioned in the literature.

Q Well, we are all familiar with the common situation, say of a Jehovah Witness, for example, who is opposed to having an operation performed on a minor. Isn't that a situation where typically resort is had to the courts?

A There is one big difference and that is the time factor. Since a child who is 10 or 11 weeks pregnant has only a very limited time to become a ward of the court, for example, and as to a Jehovah Witness in general the time factor is not too pressing as it is in the case of a pregnancy.

Q Doctor, isn't it a case where a situation often arises in an emergency where a transfusion, for example, must be administered with speed? We are all familiar with these situations.

A Indeed, in most hospitals there is a chain of command to make it very easy to do because this happens frequently, but in situations we are talking about, that is, where one [8] parent is missing and the other is in the House of Correction or something, we do not get this kind of situation often enough to work out some quick and easy and passive method of getting a court decision. At least I don't know of any.

Q The courts have traditionally been a source of resolving these kinds of parents-child conflicts, have they not?

A Well, there is no tradition involved because it is all so new. This problem —

Q Don't the courts even come into play in the situation where the interest of the parents and child and co-extensive, for example, in the donor situation or in donation where you have a situation where there may be twins, and the parents and one twin agree that a kidney, for example, should be donated to another twin, don't the courts typically sanction those kinds of procedures in your experience?

A I may be wrong, but I believe only one parent's consent is necessary in those cases. It seems strange that in an abortion two parents' consent should be necessary.

MR. BEHAR: I move that the last part go out.

JUDGE ALDRICH: Yes, that may go out.

Q You have indicated that it is generally desirable to have parents involved in the situation of a minor faced with an abortion.

A I would say a parent involved, yes, sir.

Q What benefit does parental involvement bring both to the [9] minor and the family in your experience?

A Well, if a parent can be present and involved in the situation, then the support of that parent is beneficial to the child.

Q What about the family? Have you known the family to grow from such involvement?

A I would think that is entirely up to the parent. There may be other siblings. It would be up to the parents to know whether it would be helpful for them to be involved or not.

Q Would you, in your best medical judgment, accept any reason a minor might advance for not telling her parents that she is pregnant?

A I should think I can think of reasons, yes.

Q Are there any reasons a minor might advance for not telling her parents that you would find unacceptable?

A I can imagine there would be some of those, too.

Q Could you reflect and state to the Court what those might be?

A On the one hand, as I mentioned, one can have a situation where the mother herself — the child herself is pregnant — is illegitimate and her mother is totally uncooperative with this child's actions. I can think of a Roxbury family where the father was away, and he had not been back, and there was no parent other than the mother who was totally unsympathetic to the child. It would have [10] been very difficult for the child.

JUDGE ALDRICH: I don't think you have made it at all clear to the witness what your question is, counsel.

Q My question is, are there any reasons a minor might give for not informing her parents she is pregnant that you would not find acceptable or would you accept any reason?

JUDGE JULIAN: I find the use of double negatives in your question confusing to me. Avoid the use of double negatives.

JUDGE ALDRICH: We go further than that. This is purely speculative matter. You can argue that to the Court.

MR. BEHAR: Do I understand you are excluding the question?

JUDGE ALDRICH: That particular question, yes.

Q Suppose a minor has no reason for not telling her parents she is pregnant, would you accept that as a valid excuse for not informing the parents?

A If she has no reason for —

Q She just says, "I don't want to inform my parents and I am not going to tell you why." Is that acceptable to you?

A I feel this is exactly where the counseling aspects of this question should come up and I would want to take time to talk to this child a good bit more to see if I can find out [11] what the reasons were.

Q If there is a refusal by the minor to inform her parents, in your experience and training is that symptomatic of perhaps an emotional upset relating to the pregnancy?

A Oh, indeed it may not be so. It may be quite easy to understand why she might not want to. It still leaves the physician in a great deal of a problem.

Q What I am saying or what I am asking you, Doctor, is whether the fact that a minor does not want to inform her parents of her pregnancy, is that fact symptomatic of emotional problems with that child?

A It may certainly not be so.

Q May it also be so?

A In some circumstances, possibly, but all of us know that some children are emotionally unstable and others are very stable. That is up to the physician to try to decide.

Q You indicated for the minor who refuses to inform her parents of her pregnancy that it is important for the physician to consider the medical predicament and the medical reasons

for interruption of this minor. Does that mean that a pregnancy of a minor should only be interrupted for medical reasons?

A If you will include in the medical reasons what I have said. The trauma of the abortion in the physician's opinion being far less than the trauma of carrying through the [12] pregnancy, this is a medical judgment, I presume, and partly founded on the knowledge that the younger the mother, the younger the child who is pregnant, the greater are the medical risks involved in carrying through the pregnancy.

Q Have you encountered any situations where there would be no medical reasons for interrupting the pregnancy of a minor?

A I can't think of any.

Q So it is merely the inherent risk of the pregnancy that justifies the procedure; is that what you are saying?

A Yes.

Q You indicated that in your view it is the doctor who is the person most qualified to judge the degree of maturity and responsibility of a minor who refuses to inform her parents; is that correct?

A Yes.

Q Isn't it a fact, Doctor, that in the patient-doctor relationship that is often sporadic in nature?

A It may be.

Q In fact, you may have a situation where the minor who is refusing to inform her parents may have only contacted that doctor on one occasion, that particular time; isn't that right?

A That may be so.

Q And are you telling this Court that a doctor who has sporadic contact at best with a patient is in a better position [13] than parents to gauge the maturity and responsiblity of that minor?

A I can only speak of my own experience and say that I believe that as a physician dealing in these matters for some time, I can perhaps apply a fair degree of expertise in trying to gauge the medical risks involved in either an abortion or carrying through the pregnancy. That sporadic interview may be an hour.

Q Is an hour in your view the kind of time that should be spent individually with a patient?

A It is generally adequate in this particular situation to summarize what is the problem involved.

Q And this is a one on one contact with the minor?

A It may be myself or one of my well-trained social workers.

Q Isn't this a situation, Doctor, where the minor wants something from the doctor? She wants to have an operation performed upon her; right?

A Yes.

Q And isn't it likely in that kind of situation that she is going to tell the physician what he or she wants to hear?

A I suppose.

Q And isn't it a fact, Doctor, that given that kind of a situation it is very difficult to gauge the maturity and responsibility of a minor?

[14] A As you recall, in my exhibit here, this is the situation where the doctor is wise to call in another, whether a social worker or another doctor, to support his view.

Q So the doctor clearly should not be making this kind of judgment alone?

A I am only speaking from my own experience and saying this is what I would do.

Q I understand that. Can you state to the Court why informed consent is necessary at all to this procedure?

A By informed consent one implies telling the patient what is going to happen to make it easier for her to accept a

certain amount of discomfort, to allow the client-patient to cooperate in the procedures the doctor is going to do, whether it is an appendectomy, a tonsillectomy or an abortion. It is terribly important in all medical problems.

Q In your experience, aren't there different levels at which a person can appreciate — well, let's take an abortion procedure.

A Of course.

Q There is the emotional level?

A Yes, indeed.

Q Isn't it a fact, Doctor, that it is difficult in an hour interview to gauge at which level a particular patient is appreciating the consequences of the medical procedure?

A This is exactly where the background of the doctor [15] will be helpful because a minor child finds it very difficult to appreciate the emotional trauma of a two year old infant of hers, let's say — the knowledge the doctor has of what the trauma of the sixth to ninth month of pregnancy may entail in this child, or the delivery risk — these things the doctor knows about and it is very difficult to expect the child to appreciate this, even though the doctor may try to impress the child that this is what is going to happen. It is his knowledge and background that one must rely on in making the decision.

Q Is it your testimony that a minor has difficulty appreciating the long-term consequences of a pregnancy, but somehow has a better appreciation of the consequences of an abortion?

A Oh, yes, I think that is true. An abortion, you see, is a direct and immediate situation. This is something that can be appreciated by the child. It is something that is going to happen. The child can figure what will happen tommorow or today or the next day, but to help the child appreciate ahead is a thing the physician must keep in mind in making a decision.

Q Isn't it a fact that minors particularly, and it is part of growing up, that minors particularly have trouble taking a long view?

A Of course.

Q And isn't it really on the emotional level the long-term [16] view that we are really concerned with?

A I agree that that is what I think the doctor knows about.

Q The fact that there might be an immediate feeling of relief or understanding does not necessarily mean an appreciation of long-term effects, does it?

A Well, no.

Q When you gave your opinion on direct testimony relative to 16 and 17 year olds, that a majority can give informed consent, I take it that means that a minority can not?

A Yes, of course.

Q Do you know what an abortion center is, Doctor?

A What an abortion center is?

Q Yes.

A I don't know what you mean by that question.

MR. LUCAS: I object to the relevancy of that. That is probably more tied up in another lawsuit which should not be tried in this court today.

MR. BEHAR: I believe it is relevant to the class action allegations here. I believe it is relevant to the class action motion that these plaintiffs have filed. They purport to represent abortion centers. I am asking this doctor if he knows what it means.

MR. LUCAS: There has been no motion filed to vacate that class action order.

MR. BEHAR: There certainly has been.

[17] JUDGE ALDRICH: I understood there was an attack made on a prospective finding this was an appropriate class.

MR. LUCAS: I understood the Court had ruled.

JUDGE ALDRICH: I didn't think we had.

MR. LUCAS: I don't see where this particular question has any relevance.

JUDGE ALDRICH: Maybe it doesn't. We will take it.

Q Do you know what an abortion center is?

A I don't know what you mean. Would you explain to me what you mean?

Q I am not sure I know what the term means, Doctor. You indicated that you were associated with an abortion clinic in this area.

A That is correct.

Q Would you identify it, please?

THE WITNESS: Your Honor, I would prefer not to bring in the name, but if it is important —

JUDGE ALDRICH: What is the relevancy?

MR. BEHAR: Well, there will be testimony as to what the physical set-up is at the Parents Aid Society, and in our view, it is relevant to compare structurally what goes on at this particular plaintiff-corporation with what goes on and what exists at a clinic, for example.

[18] JUDGE ALDRICH: Well, we begin right off by saying it is not proper cross-examination of this witness.

MR. BEHAR: May I be heard briefly?

JUDGE ALDRICH: Yes.

MR. BEHAR: I believe on direct examination the witness indicated part of his experience was his association with a clinic in the Boston neighborhood, I think he put it, and it seems to us proper cross-examination is to find out what the experience is at this clinic. I think it reflects upon what his testimony has been.

JUDGE ALDRICH: In what way do the individual persons at this clinic, which the witness would like to respect the privacy of, bear on what you are pointing out?

MR. BEHAR: I am not asking him to identify the names of anybody.

JUDGE ALDRICH: I thought you were.

MR. BEHAR: Just the name of the clinic. I happen to know the name of the clinic. I defended the clinic's position in a lawsuit myself. I am not critical of the clinic. I think bringing the name out does not prejudice anybody.

JUDGE ALDRICH: The witness feels it does.

THE WITNESS: I would prefer not to.

MR. BEHAR: Okay.

[19] Q But you are associated with the clinic?

A That's right.

Q Did you help set policy for this clinic?

A Yes.

Q Medical policy?

A Yes.

Q Was policy set regarding parental consent for procedures performed on minors?

A Of course. We have always had one parent's consent.

Q And you required that?

A Yes.

Q Did you deem it to be good medical practice to have such a requirement?

A At that time it certainly seemed so. This was in 1973.

Q Is this clinic licensed?

A Yes.

Q Can you tell the Court briefly what a licensing procedure is, if you know?

MR. LUCAS: We would object to any inquiry into this because the question of the validity of the licensing statute is at issue before another judge in this court.

JUDGE ALDRICH: I don't take it that that is the purpose of the inquiry. The purpose of the inquiry seems to be either to attack the witness' experience or to support it. I don't know which at the moment.

MR. LUCAS: Whether or not the clinic has complied with [20] licensing requirements, I don't see where that has anything to do with the question we have here.

JUDGE ALDRICH: As to this particular question, I would agree.

MR. BEHAR: Note my objection.

Q Doctor, does the clinic in question have any back-up agreements with any other health care facilities in the Commonwealth?

A Yes, of course. The State, in its regard for the welfare of patients, of medical clients, has established certain policies and has set up various measures and methods to see that these are taken care of. One of these is to have a back-up facility within a few short minutes drive from a clinic if the clinic was in a non-hospital facility.

Q Are these back-up agreements formalized in writing?

MR. LUCAS: Objection. This is irrelevant. He is trying the clinic licensing case.

JUDGE ALDRICH: What do you say?

MR. BEHAR: I am not trying to do anything of the kind. I want to establish from this witness that it is good medical practice, given a given volume of surgical procedures performed at an institution, to have back-up agreements.

JUDGE ALDRICH: He already said he had one. [21] What more do you get?

MR. BEHAR: This plaintiff might not have one.

MR. LUCAS: This is not any more relevant than the type of novocain used at the clinic.

MR. BEHAR: I suggest it is relevant. This is the kind of inquiry a parent, as opposed to a child, might make as to what kind of back-up agreements and what kind of patient safety was involved at a particular institution.

JUDGE ALDRICH: What particular question do you want?

MR. BEHAR: I believe the question I asked was whether the back-up agreement was formalized in writing.

JUDGE ALDRICH: What difference does it make?

MR. BEHAR: In our view, it would show there is an on-going relationship with a hospital. It seems to me that if I were a parent and I were going to have surgery performed on a child, I might want to know what kind of back-up agreements there were in case something went wrong.

MR. LUCAS: It would be our position that this type of regulation has been declared unconstitutional by the Supreme Court because it forbade first trimester clinic regulation. We handed up to the Court earlier a copy of the three-judge court decision specifically declaring this [22] transfer of agreement provision unconstitutional. We would object to inquiry into whether or not this clinic or any other clinic complies with those regulations. It is simply beyond the rights of minors issue.

MR. BEHAR: I will withdraw that question.

JUDGE ALDRICH: Thank you.

Q (By Mr. Baher) Do you know of your own knowledge how many abortions are performed at this clinic per week?

A Per week, about 40 or 50.

Q Is it your best medical judgment that where abortions are being performed in such volume that a back-up arrangement with another health care facility is good medical practice?

A Interestingly enough —

MR. LUCAS: I object to this as being an attempt to circumvent the Court's ruling.

JUDGE ALDRICH: I don't know how much of a ruling we have made. He can answer that question.

THE WITNESS: I'm sorry. Would you repeat the question?

(The following question was read:) "Is it your best medical judgment that where abortions are being performed in such volume that a back-up arrangement with another health care facility is good medical practice?"

THE WITNESS: I certainly agree, but that may [23] not be in writing. In fact —

JUDGE ALDRICH: That answers it.

Q Doctor, in your judgment, would it be good medical practice for a doctor or a clinic to agree to perform an abortion upon a minor on the basis of a ten-minute phone call?

A From my own personal opinion — I don't think I would ever have done that my own self.

Q In your opinion, Doctor, would it be good medical practice for a licensed physician to consult with a patient, a minor patient, before that minor patient signs a consent form?

A No, that is not necessary. In my own clinic the major part of counseling preparation and explanation comes from a social worker who sees the patient and I or the doctor may have no time to see the patient but will depend entirely upon the experience and expertise of those that are preparing the patient.

Q You do not go over the form yourself?

A The form, yes, because there has to be a consent form signed by the patient that she understands what is going to happen.

Q Do you go over that with the patient yourself?

A I or the doctor that is going to do it will.

Q It would be good medical practice to do that?

A I have always done it myself.

[24] Q You indicated that the younger the girl who was pregnant the higher the risk to that pregnancy; it that correct?

A That is correct.

Q Isn't it a fact, Doctor, that pregnancy is only particularly risky relative to 12 and 13 year olds, in that age group?

A Oh, no. It depends entirely on the physical maturity, not the age of the patient. There are many 17 year olds —

Q Isn't it the case, Doctor, that with good prenatal care the pregnancy of, say, a 15 or 16 year old is as safe as that of a 20 year old?

A Well, you see —

Q Can you answer that yes or no?

A No, I can not.

Q Isn't it a fact, Doctor, that pregnancies in late adolescence are as safe as those beyond adolescence?

A If you define adolescence the same way I would, then I would agree.

Q How do you define it?

A I would say that adolescence is from puberty, when the child begins to develop, to full maturity.

Q And if you define adolescence as such — ?

A The later in adolescence, the closer to maturity.

Q And the pregnancy is as safe during that time as it is beyond adolescence?

A Yes. If you say —

[25] Q I think you have answered the question.

JUDGE ALDRICH: I don't think he has.

A Would you define how late in adolescence you mean?

Q Let's take from 16 to 18.

A Would you rather say within six months of being fully mature? It may be any age. Then I would say yes — within six months of being fully mature.

Q But beyond that, you are not prepared to make that statement?

A No.

JUDGE FREEDMAN: Well, haven't you stated on several occasions that the question of danger of an abortion as opposed to carrying through to full term depends upon the physical maturity of the individual rather than the age?

THE WITNESS: Yes, Your Honor.

Q And the same could be said for the risk of an abortion, could it not, namely, that the younger the minor the riskier the procedure, the abortion procedure?

A No, that is not quite right. The risk entails the extent of the pregnancy rather than the age of the patient.

Q You are not saying there is no risk in the abortion procedure?

A There can be a risk to cutting your fingernail. It is not the age of the patient so much as — well, there is surely some connection, as you have suggested, between the [26] risk being greater for any procedure the younger the patient, but that is not as medically important as the extent of the pregnancy.

Q And that goes for pregnancy, too?

A Yes.

Q You have indicated there are risks. Are there risks in your experience in this procedure?

A In any procedure whatsoever.

Q I have not asked you about any procedure. I am asking you about the abortion procedure. Are there medical risks and complications that attach to this procedure?

A Of course.

Q Could you, based on your experience and training, detail for the Court what these are?

A The risks involved in abortion may be a certain amount of temperature reaction, a certain amount of bleeding, cramps or pain. These things may certainly be quite prevalent in any of these procedures.

Q Would there be danger of perforation of the uterus in this procedure?

A That is a remote possibility if the procedure is done by trained physicians.

Q Are there any of these complications that would require hospitalization, Doctor?

A A perforation certainly could. I think this would be [27] very, very unusual and unlikely to happen. Severe bleeding could mean hospitalization or an unknown temperature reaction would perhaps require medical care.

Q In your judgment relative to these complications, if they occur to a minor who had not obtained parental consent for an abortion, in your judgment, do you think the parent ought to be informed relative to the complications once they resulted in hospitalization?

A I would think so.

Q Isn't it a fact, Doctor, that if a parent was notified in a situation where the minor had been hospitalized as a result of complications, the emotional impact on that family would be far more deleterious than it would have been if the parents had been involved at the outset?

A You are presenting a possibility so remote it is hard to answer anything to it. I suppose you can think of situations like that. But, in the first place, the numbers of patients who do not have parental consent and have complications are very, very few. If you were to multiply these rare occasions, I suppose you could find a situation where the answer should be yes to your question.

Q Are you familiar with the term morbidity as used in relation to abortion?

A Yes.

Q Would you tell the Court what you understand that term to [28] mean?

A Morbidity refers to the type of complication that I mentioned, that is, the non-fatal situation of a temperature or an infection or bleeding or something of this sort.

Q Doesn't the term really go beyond the actual complication but looks to long-term effects of the particular complications?

A No, I don't think morbidity has any further meaning than just what I said.

Q You indicated on direct examination that it is important for the gynecologist to deal with the psychological aspects of an abortion situation for a minor. Is that correct?

A Surely.

Q And then you made a comment which I did not understand. You said, and I am quoting, "I'm afraid a lot of gynecologists have other surgical interests in mind." What did you mean by that? You said that not enough doctors really paid attention to the psychological aspects and then you said, "I'm afraid a lot of gynecologists have other surgical interests in mind." What did you mean by that?

A I think I meant —

Q Do you recall saying that?

A I am sure I did if you have got me quoted. I don't remember it. I think I meant that many gynecologists are not very apt to spend much time in the office dealing with purely emotional affairs dealing with the reproductive tract.

[29] Q What are these other surgical interests you had in mind that these doctors might have?

A Well, I think, of course, a hysterectomy is one. Perhaps it is not too often, but a hysterectomy is a usual procedure for a doctor to do.

Q Doctor, I just happened to be reading the Boston Globe of December 4, 1974, and the paper reports a study of gynecologists, and it was done by a gynecologist who toured various hospitals, and he was concerned with tubal ligations and the performance of this procedure, and he indicated that what he termed a significant minority of residents and interns at teaching hospitals were performing these operations unnecessarily and they were doing so because of a deep-seated personal belief regarding overpopulation and what their particular physician regarded as an ideal number of children for any family.

He also indicated these procedures were being performed because of frustration over the millions of dollars spent to support the welfare program.

In your experience, have you become aware of doctors that perform operations for these reasons?

MR. LUCAS: Let me object to that and particularly the use of a newspaper because it lacks any foundation. It is certainly not a scholarly treatise, although it is a good newspaper. I think the question is very [30] ambiguous. It has two or three elements to it.

JUDGE ALDRICH: It seems to me the question could have been put in much simpler language. To that extent, I will sustain the objection. You could have asked him all that without making a speech. I strike the question.

Q Doctor, in your experience, are you aware of physicians, and particularly gynecologists and obstetricians, who perform — well, we will leave it at gynecologists, who perform surgical operations based on personal beliefs, such as aversion to welfare, population control and their conception of what an ideal family size is?

MR. LUCAS: Objection. That question has too many factors in it.

JUDGE ALDRICH: He may answer.

A I don't think any doctor should perform operations for these other issues. We are taught and trained that what we are trying to do is to take care of the health of the patient.

Q Doctor, I did not ask you that. I asked you if you are aware of doctors, either from your own experience or from reading the literature, who, in fact, do that?

A I certainly am aware of all sorts of doctors who are not following the code.

Q And these are the doctors you would have make the decision for the minor on whether to have an abortion?

[31] A Oh, no, not at all. The same group of doctors who would do a hysterectomy without any medical reason for doing it, these are doctors who are not following the training and beliefs and code of ethics that they were brought up to follow.

Q If a patient is encountering a doctor for the first time, that patient is not going to know whether the doctor is one of these doctors you have said is violating the code or one who is perhaps following the code, is she?

A I think she is if she is going to a hospital or a clinic. She is going to trust the organization that she went to.

Q And that trust could be misplaced if the doctor is the wrong kind of doctor who is going to violate the code; is that right? Yes or no?

A I don't know, I guess.

Q You guess?

A Well, would you say that again? It is so clearly obvious — are you saying if she knows she is going to a criminal, would she have trust?

Q She is dependent really upon the doctor, isn't she? She doesn't know. The doctor is not going to have that on the office shingle that he is violating the code, is he?

A Not a criminal doctor.

Q So she is taking a chance?

A If she goes to an illegal abortionist, she is taking a [32] chance, yes.

JUDGE ALDRICH: I think you have gone far enough in arguing your case.

Q Is an abortion properly characterized as a surgical procedure in your judgment?

A Yes.

Q In your judgment is it good medical practice to begin starting the patient on antibiotics immediately preceding an abortion?

MR. LUCAS: Objection as to the details of a particular medical practice. I think the Supreme Court made it clear that the particular practice of the physician in the first trimester is a matter between the physician and the patient. While there may be disagreement over when and at what point to use antibiotics, I don't think it is a proper line of inquiry having to do with the rights of minors.

JUDGE ALDRICH: Do you want to make the same argument there? A girl might go to a crook the way a grownup might go to a crook?

MR. BEHAR: That is part of it, Your Honor.

JUDGE ALDRICH: What else?

MR. BEHAR: Well, in our view, there are different medical procedures that are being utilized. It seems to me that when you have a minor who shows up at a clinic, she is not going to be asking questions.

[33] JUDGE ALDRICH: We will hear that argument when we come to it, but I don't see what you are gaining now except wasting time.

MR. BEHAR: Are you overruling the question?

JUDGE ALDRICH: Yes, because it is argumentative.

MR. BEHAR: Note my objection.

Q In your experience, Doctor, has it ever been necessary for a physician to consult with a minor's family doctor before performing an abortion?

A Indeed, the family doctor may be a very excellent person to talk to, as I have suggested, particularly if the child refuses to involve the parents. I think I mentioned some trained person, even a minister, and the family doctor might be someone we might call in.

Q Would you have occasion to consult a family doctor for medical reasons relative to a minor?

A I think in our clinic anyway we try to see that the client goes back to her family doctor after the procedure if she possibly can. We feel that this is a very good way to follow up.

Q Your experience has been in situations where you have parents present or at least one parent present.

A One parent's consent, yes.

Q During these consultations has it been your experience that [34] a parent is ever able to supply knowledge relative to a minor's medical history that the minor does not have?

A I don't think anything that would be appropriate to the situation. In other words, the fact that the child had chicken pox or something like that is not pertinent.

Q Has a parent ever amplified the history of the child?

A If you know parents, then you know how they talk. Most of it is irrelevant to the problem.

Q But they have provided information in situations where the minor has not been able to?

A Of no significance to the decision, yes.

Q Doctor, do you encounter the situation in your clinical experience, and maybe in your training, where a minor has articulated a fear of involving her parents, and the parents are then informed of her pregnancy, and the fear is not realized?

A I do not happen to remember that particular situation, but I can think of many other situations that would seem to follow the same pattern.

Q In other words, not all the minor's fears come true, is that right?

A Indeed, no, that is true.

Q In fact, on direct testimony you stated, "Often enough the young person is possibly wrong for not wanting to inform her parents"?

[35] A It can happen.

Q Relative to the hospitals and clinics you have been associated with, have they ever had occasion to make referrals to state agencies regarding families they did not regard as suitable for a child?

A For the care of the child?

Q Yes, for the care of the child.

A After an abortion?

Q I mean in general.

A In general, most hospitals have social service departments that are very closely affiliated with state agencies.

Q And in these situations, and oftentimes as a result of hospital intervention, there can be a guardian appointed for a particular minor?

A For a child without —

MR. LUCAS: I object to the relevancy.

JUDGE ALDRICH: You may go ahead.

Q In a situation where that is the case, where, for example, in a situation you posed as being an instance where you did not think it was a good idea for the parents to be informed, that is a retarded mother and an alcoholic father, that would be the kind of a situation where a guardian would be appointed?

A Correct.

Q Do you understand the statute in that situation to require [36] dealing with the guardian or with the parents?

A I don't know the statute. We have had cases just like that, with an older sister —

Q I think you have answered the question. In your view, Doctor, are there any surgical procedures which, in your judgement, a 17 year old can not give an informed consent to?

A Indeed, in my experience and affiliation in hospitals in this town, those procedures that need a total anesthetic, putting the child out with some sort of an anesthetic, all these procedures need some adult consent. I don't know that there

is any law about this, but this is the policy as far as I know. Of course, abortions done under novocain are out of that range.

Q Well, are you saying it is good medical practice to have parental involvement in all situations where there is a general anesthetic?

A Yes, a guardian or parent surrogate, yes.

Q Are there any general procedures not involving a general anesthetic that in your view a 17 year old, for example, could not give an informed consent to?

A I don't know. I would have to think about that. I'm not sure that there are.

Q Is it your view that a 17 year old can give an informed consent to a tubal ligation?

[37] A I think that indeed she could be capable. Let's say older adolescents, rather than age, would be able to give an informed consent.

Q What about the younger adolescents?

A There again, it depends on the child, doesn't it?

Q Well, for the younger adolescent what did you say that as a class younger adolescents could not give an informed consent to a tubal ligation?

A As a class — I would think that tubal ligation is something we do not do for young adolescents. It is wholly out of my medical experience to even consider doing a tubal ligation under a local.

Q I am talking about the ability to appreciate the procedure, whether it should be done or not. Is it your judgment that younger adolescents as a class could give informed consent to that procedure?

A No better than they could a hysterectomy, which is not done. We do not challenge them with the necessity to decide these types of operations. These are elective operations. One

does not even bring them into the problem of the younger adolescent.

Q In your medical experience is sterility a possible consequence of an abortion?

A Oh, no.

Q You would not say that?

[38] A Oh, no, certainly not.

Q If it is done badly?

A Well, if you get an infection, I suppose, this complication, which is rare, I suppose this might have some bearing on some possible sterility, but in general that is not the case.

Q It is not?

A It is very rare.

Q It is very rare?

A Right.

Q Well, in a situation where it is rare and that consequence exists, are you saying younger adolescents as a class can nonetheless consent to a procedure where that is a very real consequence?

A Of course. That is something one talks about when one talks to an adolescent beforehand or the surrogate.

Q Doctor, do you have personal views relative to State regulation of abortion?

A To the State regulation of abortion?

Q Yes.

A Could you help me as to what you mean by State regulation?

Q State statutes that govern the particular procedure.

A As I said before, I feel that that decision has to be a medical decision, that no legislator in the State House [39] can decide whether this particular individual carries a greater risk in carrying through the pregnancy than the minor risk in abortion. I don't see how a law can make this decision. It must be the physician's challenge.

MR. BEHAR: I have no further questions.

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CROSS-EXAMINATION BY MR. REYNOLDS

Q Doctor —

MR. LUCAS: We have not been able to find any appearance for Mr. Reynolds in the record. He has not signed any of the pleadings. I would like that clarified.

MR. REYNOLDS: I think the docket will show that my appearance is in. I met my brother on the occasion of taking a deposition.

JUDGE ALDRICH: Well, if you haven't, then it can be rectified later.

MR. REYNOLDS: Thank you, Your Honor.

Q (By Mr. Reynolds) Good morning, Dr. Sturgis. I am referring, Dr. Sturgis, to what has been marked here as Exhibit 4, which you identified as a statement submitted to the Executive Board of the A.C.O.G. You participated, as I understand it, in the formulation of this document; is that so?

A Correct.

Q The only date I see on the document is April of 1972. [40] Was the document submitted to the Executive Board at or about that particular time?

A I would guess so.

Q Has the Executive Committee passed in any way upon the document which was submitted for their consideration?

A They passed on it in this way, by giving it to their publication to be published in the bulletin. Whether it was the next one or not I'm not sure, but that was their action involved, if you wish, or approval of the Committee.

Q It is your understanding they did approve it?

A They approved of publishing it in the bulletin. As far as I know, the next A.C.O.G. Executive Committee meeting would have been in the spring of the next year.

Q You do not actually know whether they have accepted this as a statement that they want to put out as a position by the College?

A That is correct. I think I made that clear.

Q Doctor, at the time this was formulated, you were talking about minors, you were talking about those who were age 18, 19 and 20; isn't that so?

A I don't recall. Did we say the ages?

Q I don't see any place —

A Indeed, I do remember. We very carefully did not identify the minor by age because we got into a huge hassle in the Committee that you could not say 15 was [41] different from 14 or 17.

Q As part of your common knowledge, you knew at the time you composed this paper that when you used the term minors you were talking about people below the age of 21; is that so?

A Yes.

Q Since that time, you know there has been a change in the legislation here in the Commonwealth of Massachusetts?

A Yes.

Q There has been indeed a change in many places across the land?

A Right.

Q And people age 18, 19 and 20 are no longer considered minors, are they?

A That is correct.

Q You do mention teenagers in this report, do you not?

A Yes.

Q It is correct that when you were formulating your opinions here, you were particularly concerned with an-

nouncing what you considered to be the rights of people age 18, 19 and 20? They were more affected by what you were saying than any other single group?

A That what I am saying here in this court —

Q Yes.

A I don't think we ever considered that, sir, because [42] I was quite aware that you had to be under 18 these days to be considered a minor.

Q At the time you wrote this, it was not 18?

A At the time we wrote this they were included as minors.

Q Didn't you take into account those young women who were age 18, 19 and 20 specifically?

A They were included, although they were not —

Q Thank you very much, Doctor. That answers the question.

Now, you say that in your practice, those that you are associated with, it is part of your regular procedure to obtain the consent — and I assume that is written consent of one parent, is that so?

A Yes.

Q You have no particular quarrel with obtaining the consent of one parent, do you?

A No.

Q As a matter of fact, you said, I think, in the vast majority of cases you do obtain the consent of one parent; isn't that so?

A It happens to be so in our clinic, yes.

Q So far as you know, that is the generally accepted medical practice here in the Commonwealth, isn't it?

A I am not sure about that today because we set out policy before the Supreme Court decision.

[43] Q I'm asking you, sir, about your knowledge of the general medical practice here in the Commonwealth.

A I really haven't that much knowledge to give you.

Q There was one question about your affiliation, and you said you were associated with a local university clinic. By that you meant some clinic here in Suffolk County?

A No. It was a university health agency. I suppose you could call it a clinic.

Q Physically located in Suffolk County?

A No, across the river.

Q If it is across the river, it is over in Middlesex County?

A Right.

Q With regard to surgical procedures on young women under the age of 18, other than an abortion — I am not talking about an abortion — you must, I assume, in your practice perform some surgical procedures on young women under that age other than abortions, isn't that so?

A Under local anesthesia, yes.

Q Isn't it true that in your practice you obtain a written consent of a parent for that?

A Oh, I don't think so. I can think of a paranythia fingernail, or minor things.

Q Anything more significant than that?

A Even more significant than that, in the case of the university health center that you mentioned that I work in [44] many times a boil or something else has to be operated on and the parents are on the other side of the continent.

Q And you can't get in touch with them?

A Yes, and you go ahead.

Q That would be an emergency procedure?

A Absolutely.

Q And it is relatively simple?

A Under local anesthesia. We would not if it were general anesthesia.

Q In your practice isn't it so that hospitals in this area do not remove tonsils or do not remove an appendix without the written consent of a parent?

A Neither of those can be done under local anesthesia.

Q You do get the consent of a parent in those cases?

A Of course, because they need general anesthesia.

Q And whether it is because of that or not, you do, in fact, get consent; isn't that so?

A It goes with what I said. Any general anesthetic has the consent of one parent.

Q Do you know of any situation where, other than where a general anesthetic is used, it is not the customary procedure to get the written consent of the parents?

A Let me see. The procedure that is —

Q A surgical procedure.

A A local procedure that does not need a parent's [45] consent?

Q I am talking about the accepted medical practice as you know it.

A Would you give me another chance? Would you state it again?

Q Surely. I am talking about general medical practice as you know it, and I am talking about situations in which a general anesthetic is not required. I am asking in those circumstances isn't it the case that doctors and hospitals you know of as a regular medical practice obtain the written consent of a parent?

A No. I think frequently — at the Massachusetts General where I worked for some time, oral consent over the telephone was acceptable.

Q Oral consent over the phone?

A Yes.

Q But there is some communication with the parents or there is at least an attempt?

A Well, if it was infected fingernail, I doubt it. It depends on the severity of the surgery.

Q In your paper you refer to the time when the patient is responsibly mature and adamant about not involving her parents. I am zeroing in on this "responsibly mature". You mean by responsibly mature a financial consideration, do you not, Doctor?

[46] A No. The married minor generally is considered responsibly mature. Whether or not she is in the poverty group, she is able to make a decision by law.

Q So you are talking about a female who is married and below age 18. And would you call that person an emancipated female?

A Yes.

Q Other than the emancipated female, a young woman who is married below the age of 18, are you talking about anybody else when you describe them as responsibly mature?

A Yes, because the marriage license really may not have anything to do with your decision as to whether or not she is an emancipated minor.

MR. REYNOLDS: I move that go out, Your Honor. It is not responsive.

JUDGE ALDRICH: I couldn't even hear what your question was.

MR. REYNOLDS: I'm sorry it wasn't heard. I would like it to be heard. May I ask that the court reporter read it back?

JUDGE ALDRICH: Yes.

(The question is read.)

JUDGE ALDRICH: I think you can rephrase that a lot simpler.

Q Doctor, I would like you to keep in mind for the purpose of [47] this question that girls who are married are out of the question.

I am asking you in consideration of your committee, when you used the term "reponsibly mature", who were you talking about? What group of people?

A We were talking about the minor child again.

Q Did you put any parameters on the minor child in your own group?

A Any age?

Q Well, whatever parameters you put on.

A We were talking about the youngster who seems to be adult in her development.

Q No consideration at all as to whether they were age 11 or 22?

A Well, Mr. Reynolds, there are 22 year olds who are retarded as much as 11 year olds. You can not say that age makes a difference.

JUDGE FREEDMAN: Well, someone 22 is not a minor.

THE WITNESS: That is correct.

Q You said in your report of the committee that you were seeking to establish useful guidelines for physicians, and that you had in mind helping your patient as well as the physician and the patient and her parents. What kind of things did you have in mind that would be helpful to the patient and her [48] parents in their relationship to the child?

A I think what we have commented before, that is, that if the parent can be brought in to support the child in the decision, that may be helpful to them both.

Q And, as a matter of fact, you said not only would it or might it be helpful, but you considered that to be helpful in every situation or very nearly so; isn't that the case?

A I can imagine it would be.

Q Doctor, you have said that abortion is a surgical procedure. Would you agree that it is an elective surgical procedure?

A Indeed, yes.

Q In the first trimester abortion situation, in the vast majority of cases presented to you, they are not emergency cases, are they?

A I would not say that because in our clinic we are getting probably 30% in the over the ten weeks duration.

Q Over 30% are over ten weeks?

A Yes.

Q So that 70% are under ten weeks?

A Probably.

Q In the case of those 70%, whether you perform the abortion today or tomorrow or Thursday, it is not going to make any significant difference, is it?

A Not within days, but within weeks, yes.

Q Within a week?

[49] A I'm sorry. Is that a question?

Q Yes, sir.

A I didn't hear it.

Q You said, as I understand it, that you should not go into a period of weeks waiting on this, but you can wait a matter of days.

A A day or two.

Q Would 72 hours be too much?

A The earlier it is done, the easier it is to do. You know that.

Q No, sir, I do not. If somebody presents herself to you and she is six to eight weeks pregnant, it doesn't really matter from the standpoint of morbidity or mortality or risk of any form whether that is performed today or a week from now?

A It is a little easier the earlier it is done.

Q It is easier, but there is no substantial increase in the risk factor, is there?

A Not substantial for a week difference.

Q Do you know of any statistics that support any increase in the risk factor?

A There is a gradual increasing risk involved as the extent of the pregnancy is increased.

Q But on or about the time the first trimester has passed, before that time, that is considered a particularly safe area for the performance of an abortion, isn't that true?

[50] A It is safer than after the first trimester.

Q Doctor, you said in your statement, Exhibit 4, that the people who participated in the preparation of the statement were a committee of physicians and some behavioral scientists, and a legal consultant. Would you identify for us, please, who the legal consultant was that participated in this preparation?

A I'm sorry. I do not have the list. I did not bring with me the list of the Committee. I believe it was someone from the American College of OB/GYN.

Q Maryland College?

A No, American College of Obstetrics and Gynecology. I don't remember the names.

Q How many served on this committee?

A About nine, I think, were on the committee.

Q How many of them were physicians?

A Approximately four, I think. The others were behavioral scientists, Ph.D.'s in behavioral science, and we had one or two social workers also who were Ph.D. people and we had a nurse or two.

Q Several times in the paper you mentioned the modification in the law with respect to the treatment of those who have drug abuse and that minors can now be treated for that.

A Without parental consent.

Q Without parental consent. You are aware, Doctor, that in [51] those cases the financial responsibility of a parent is removed?

A Surely.

Q You know that?

A This state and other states probably also provide this service free.

Q In other words, under our statutes, when somebody is found to be drug addicted, that determination requires a joint determination by at least two physicians. That is one thing, isn't it?

A I am glad to know that. I don't know the wording of the statute exactly. I would assume the physician would try to get a parent in, just the same as for an abortion.

Q I am talking about a specific statute. In that particular framework, that particular area, that problem area, where you have drug abuse, a minor is prohibited from rescinding a contract. Did you know that?

A No.

Q Are you aware of the fact minors in the Commonwealth have the privilege of rescinding a contract?

MR. LUCAS: Objection to that. That is a legal question. In the few cases we have run into, if medical treatment was a necessity, a minor can contract. He is asking a question that is improper because its foundation would not stand up under Massachusetts law.

[52] JUDGE ALDRICH: It seems to me that all you are calling for is the knowledge of the witness. To what extent it may be relevant remains to be seen. He may answer.

A I am so naive legally. I don't know what rescinding what contract refers to. I'm sorry.

Q In other words, the ability of a minor to walk away from a contract she has made.

A What contract she has made?

Q Any contract, a contract to have —

JUDGE ALDRICH: Counsel, I think you are getting far afield. If you have something in mind, ask it.

MR. REYNOLDS: Yes, sir, I am asking about the statute that deals with drug abuse.

JUDGE ALDRICH: And the relevancy escapes me. If you want to ask him something about the statute, go ahead.

Q With regard to Chapter 112, Section 12P, which is what we are talking about here, there is no provision for a minor to rescind this contract, is there?

A This is a legal term. I don't know what you are talking about. I'm sorry. Rescinding a contract has to be defined.

JUDGE ALDRICH: It seems to me that this is a question that could be put in much simpler language. [53] Both you and your precedessor, if I may say so, have to make a speech before they ask a question.

MR. REYNOLDS: I'm sorry, Your Honor. I did not mean to do that.

Q In you paper you present the conclusion that there are three particular serious problems coming out of early sexual activity and that those problems affected the individual and society. Isn't that so?

A Yes.

Q And you meant by society — you had in mind the town in which the girl lives, the community and the state, indeed?

A I presume the community would probably be it.

Q How did you conceive society was affected?

A That the community was affected?

Q Well, society.

A I am just looking at my paragraph here.

Q Page 2.

A Page 2, yes. Of course, it is perfectly clear that what we were talking about was the possibility of venereal disease increasing by early sexual experience and that this was clearly a community hazard of difficulty, the emotional stress and trauma.

Q I gather you support the State's interest and legislation with respect to the treatment of venereal disease?

A The State is very helpful, but parental consent is not [54] required, of course.

Q Later on in your paper you suggest that when a troubled child comes to you and says she has this difficulty or she is pregnant and wants to be aborted and she doesn't want you to tell her parents, you said oftentimes what she really wants is for you to tell her parents, for the physician to tell her parents; is that so?

A If she will give permission, that would be what I would do, yes.

Q Your paper suggests that that is a real situation, that physicians are not often asked to keep a confidence, and as they explore it they found that really what the patient wants is for the doctor to make the call to let the parents know.

A This can be one of the difficult things for a doctor to try to keep in mind.

Q Has that happened to you in your own practice?

A I can't give you chapter and verse, but I imagine so.

Q You would have no objection to playing the part of the kindly informant to the parents, would you?

A I wouldn't do it if the child —

Q I am saying if you determined her position was that actually she was asking you to make the information known.

A I wouldn't have the competence myself in knowing that to be the case.

[55] Q Now, you have on Page 5 a situation where when the physician judges that the girl who refuses to tell her parents is incapable of making a considered decision — it begins that way — you are saying that you do run into those who are incapable of a decision up or down; isn't that correct?

A Of course.

Q And you are saying that in that kind of situation your view of the proper way to handle it is for the physician to step in and to make a decision as to which way — which is best done medically to treat this patient.

A That is not what is said here. The physician should carefully select a medical colleague, a fully qualified and responsible member, and so on, to share his decision.

Q Right. You would make a decision which is your opinion best for the girl who is incapable of a decision, and you would get support from a colleague with regard to the decision that you would make?

A That is what I would recommend.

Q You might take a medical colleague or —

A — a social worker or a clergyman, or whoever.

Q How about a lawyer?

A A lawyer, if he was competent, in my opinion, to deal with this situation.

Q When that kind of decision comes about, do you have in mind the ramifications of the financial aspects of such a [56] decision?

A Well, of course that must come into it.

Q Would it be your view that the physician would make the decision in favor of the abortion, if a child is incapable of a decision, and that the physician ought to shoulder the financial burden?

A I don't think that follows. I think it is mentioned here that appropriate action might be to bring in a social agency, a family counselor or youth counseling service.

Q Suppose in that situation that the family is perfectly capable of paying for the procedure?

A Well, I think that is one of the aspects that should not interfere in the physician's decision as to the medical care of his patient.

Q And because you have a girl who is in your estimation incapable of a decision, your view is that you should nonetheless maintain her confidence and not discuss the condition with her parents?

A Here again, I would want to talk this over with someone else.

Q The party who makes that decision then makes the decision as to whom he would discuss the matter with?

A The physician makes that decision.

Q Would there be any record kept in your view of that?

A Probably. It may well be that the counselor — let's [57] say the girl is mentally incapable of making a decision. It may be that the counselor or the psychologist, or whoever it is, would say, "We have to tell the parents." This would be the decision to be made by them.

Q Let me present this situation to you. You have a girl who is in your view incapable of a decision and she has asked you to keep her confidence, and she is the daughter of a physician. Would that change your mind?

A Well, it would make it very difficult. I would think I would want to get somebody else in on this situation.

Q Is there anything you know of in your practice as a physician which would require the sanctity of confidentiality between the doctor and his youthful patient?

A That would require that to violate that confidence?

Q Yes.

A I would think the incompetent patient, the mentally retarded patient of a degree unable to make an informed consent, would be one of those where one would have to violate, let's say, the confidentiality involved.

Q Is there any code in medicine that says in those circumstances a doctor is obliged to keep a confidence?

A It comes in the Hippocratic oath. I can not quote it exactly, but "he shall not give his patient's confidence." It has been quite a while since I took the oath.

Q Is there anything in the Hippocratic oath with regard to the [58] surgical procedure of aborting or abortion?

A Yes, I think so.

Q Does it prohibit it?

A I can't quote it, but in those days, it was considered probably a moral situation to abort a woman.

MR. LUCAS: This is discussed fully in the Supreme Court decision, the Hippocratic oath.

MR. REYNOLDS: Thank you. I have no further questions.

MR. LUCAS: I will try to keep the re-direct very brief.

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RE-DIRECT EXAMINATION BY MR. LUCAS

Q Doctor, I believe you testified that at the clinic you are associated with they require the consent of one parent normally?

A Yes.

Q Would it complicate matters to require the consent of both parents?

A Yes.

Q In what way would this complicate matters?

A Too often the parents may not be living at the same place. Too often the parents may be in conflict, where the child is closely related to one parent but not the other, and when to insist on telling the other parent may serve [59] to cause considerable marital conflict.

Q In your experience in dealing with minors, how many of the parents are trained gynecologists?

A Very few.

Q How many are trained psychiatrists?

A Parents?

Q Yes.

A Very few.

Q Do many of them have any training in counseling or dealing with the problems of minors?

A Generally not.

Q Do you have any knowledge of the number of patients who call the clinic you are associated with to find out about the parental consent requirement and then go elsewhere?

A That might be a good many. We only —

MR. REYNOLDS: Objection. I don't think it is responsive. May I have the question and answer read?

JUDGE ALDRICH: Yes.

(The question and answer is read.)

MR. REYNOLDS: I defer to Mr. Duffey. That is not what I heard.

JUDGE ALDRICH: Go ahead, Doctor.

THE WITNESS: Yes, I am sure there are a good many. I can't give you the numbers though.

[60] Q I believe you testified an abortion was considered as a surgical procedure. It is considered a minor surgical procedure or a major surgical procedure?

A Minor procedure.

Q Is it one of the most minor surgical procedures in the ACOG characterization of surgical procedure?

A That is correct.

MR. REYNOLDS: I object. He is leading the witness with regard to that.

JUDGE ALDRICH: It is leading.

Q Do minors ever seek out tubal ligations?

A No. I have never known any minors to ask for this.

Q Have you ever known of a minor to seek a hysterectomy?

A No.

Q Does the delay of a week for a minor who is pregnant affect her emotional condition at all? Does it increase or decrease anxiety?

A I think it obviously does. Most minors find the waiting period even of a day or two or three a period of extreme stress. In the minor, the underdeveloped minor, this is a very difficult time for them to go through from a mental point of view.

Q There were some questions asked you concerning an agreement with local hospitals. Is it your experience that emergency rooms accept persons coming there with [61] emergencies with or without a written agreement?

A Indeed, yes. We have had a few complications. They have been taken care of by a hospital that has no written agreement with our clinic.

Q Is abortion sometimes characterized as a medical as opposed to a surgical procedure?

A Medical rather than surgical?

Q Yes.

A There are being developed medical ways of carrying out an abortion, but they are not generally done now.

Q Does a first trimester vacuum abortion involve any cutting on the patient at all?

A No.

Q Have you had any experience, other than with counselors, paramedical personnel, being utilized in abortion clinics?

A I have had no personal experience.

Q Do you know of any instances of family doctors informing parents of a pregnancy when the minor did not want the parents to be informed and breaching their confidence?

A I am sure that could happen. I don't know of any specific time but I could imagine that it could happen.

MR. LUCAS: I have no further questions. Thank you very much.

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[62] RE-CROSS EXAMINATION BY MR. BEHAR

Q I just have a few questions. What is it, Doctor, about general anesthesia that requires parental consent?

A It is that general anesthesia involves a whole lot of new and much more severe risk to the patient, no matter for what it is done, even if it is done for a minor tonsillectomy, still the knocking out of the conscious and the complications of general anesthesia demands consent.

Q Well, the fact that anesthesia is a consideration — that does not go to the ability of the patient to understand what is going on, does it?

A No.

Q The fact that you are using anesthesia has absolutely nothing to do with the ability, emotionally or intellectually, of the patient to understand what is going to happen to him or her?

A Would you characterize what you mean by anesthesia, whether general or local anesthesia?

Q I am talking about general anesthesia. The fact that general anesthesia is being used does not really relate to the ability — or are you saying that it does not relate to the ability of the patient to understand emotionally and intellectually what is about to happen to him or her?

A I think the answer to your question is it does not make any difference.

[63] Q Well, the mere fact a surgical procedure involves general anesthesia, that does not require or that should not be the determining factor whether the parents should be involved?

A Well, it is the determining factor, Mr. Behar. If a general anesthesia is going to be used, then it is necessary to have the parents' consent.

Q Is there something about the use of general anesthesia that makes it impossible for a minor to understand what the procedure is all about?

A Oh, no.

Q So it is just arbitrarily done this way?

A The parental consent for general anesthesia has been developed over the years, I suppose, as a policy, for hospitals, and so on, to insist on this.

Q In the situation where you have a minor who can not make up her mind, and that is the situation you treat in your statement, it is going to take some time to counsel that minor, isn't it?

A It may take some time.

Q It may take a few days?

A Probably not, no.

Q You could just reach a decision right off the bat?

A No. I think you could probably find a counselor readily available to come in that day and help the child make up her mind.

[64] Q You don't think it is a good idea to have the minor think it over?

A Well, it may be an hour or two hours or it may be a day.

Q And there would be delay in that situation?

A We have already covered the delay situation.

Q The delay is going to be beneficial to the minor in that situation because it is going to give her a chance to think things out?

A I think also, as I said before, it is an agonizing situation if there is delay.

Q Does dilation and curettage involve cutting of the patient?

A No.

MR. BEHAR: I have no further questions.

MR. REYNOLDS: No questions.

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RE-DIRECT EXAMINATION BY MR. LUCAS

Q When you have minors coming in that have the parents' consent, under 18, do you find the minors themselves understand the procedure and give an informed consent?

A I think in general, yes.

Q So they could give an informed consent with or without their parents?

A Indeed. Mostly that is the case.

MR. LUCAS: Thank you.

[65] JUDGE ALDRICH: We will take a short recess.

(Recess)

MR. BEHAR: Dr. Hodgson, please.

MR. RILEY: Your Honor, is it permissible for the members of the Massachusetts Bar to sit within the bar enclosure?

JUDGE ALDRICH: Yes.

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JANE E. HODGSON (RECALLED)
CROSS-EXAMINATION BY MR. BEHAR

Q Would you restate your name for the record?

A Jane E. Hodgson.

Q Where do you live?

A 1537 North Fisk Street, St. Paul, Minnesota.

Q You indicated that you were associated with Pre-Term, Washington?

A Right.

Q What years were your association?

A From March of 1972 to December of 1973.

Q Were you paid a salary by Pre-Term?

A Yes.

Q Are babies delivered there?

A No.

Q Was your association with Pre-Term following the court case in Minnesota that your attorney referred to at the [66] earlier hearing?

A Yes.

Q You indicated that you are a counsulter with two free-standing clinics in Massachusetts; is that correct?

A Yes.

JUDGE JULIAN: What kind of clinics?

JUDGE BEHAR: Free-standing clinics?

JUDGE JULIAN: Do we have a definition?

MR. BEHAR: I believe it is just a term that is used to show it is independent of a hospital. There are some clinics associated with a hospital.

JUDGE JULIAN: Very well.

Q Do you have any objection to identifying them for the record?

A I don't know of any reason. Pre-Term of Boston and Charles Circle Clinic.

Q These are both licensed by Massachusetts?

A Yes.

Q Were you paid a salary for your consulting work?

A Yes.

Q During the time that you left Minnesota, your sole source of income was with clinics that performed abortions?

A Well, no, not entirely.

Q Could you amplify?

A I had a private practice for 25 years prior to leaving Minnesota and obviously some of my income still came from [67] my private practice.

Q But the current work you were doing was solely in the clinic connection:

A That is right.

Q Do you know what an abortion center is?

A No, I don't believe I do.

Q When you use the term abortion, which trimester of pregnancy do you refer to?

A I usually specify first or second trimester.

Q Your attorney asked you a number of questions and you used just the word abortion when you responded to those questions.

A Well, the majority of abortions are first trimester. If there is any reason to specify, I would do so.

Q Were the various opinions you gave this Court at the prior hearing limited solely to first trimester abortions?

A If I did not specify, they would be, yes.

Q Thank you. You indicated that you have had experience —

A May I correct that?

Q Yes.

A When I am speaking of abortion in the broad sense, it may well have included mid trimester also in discussing abortion as an issue. I think it would depend entirely on my usage, on the particular sentence. I might have used abortion in a general sense and neglected to have specified both first and second trimester.

[68] Q But generally when you used the term you were referring to first trimester?

A I would say generally, yes.

Q You indicated that you had experience and training in both the medical and psychological aspects of abortion; is that correct?

A Yes.

Q What medical aspects are involved in this training?

A Well, that is rather lengthy. I don't know how much detail you want me to go into. There are books written on it. There are many, many aspects. It takes weeks, actually, of training a physician in not only the technical aspects, the indications for the procedure, the complications, the pre and post-op care, the use of the equipment.

Q Regarding the complications, what are among the ones you focus on in this training?

A The medical complications are really surprisingly few. Most of the complications of the abortion procedure, and I am referring to the first trimester, primarily are delayed in type. In other words, they do not occur until two or three days usually after the procedure. In a series of 10,000 which are recorded, and it just appeared last month in the American Journal of Obstetrics and Gynecology, we noticed the paucity of complications occurring in the first 24 hours. The common complications are hemorrhage, [69] infection and retention of tissue. The incidence of perforation is the only medical complication. That occurs on the average of less than one per thousand.

Q That was in your study?

A Right.

Q Isn't it a fact, Doctor, that there are other studies which indicate that those complications are very considerably higher?

A I don't think there are any that are a qualified study.

Q You, yourself, in the report you are talking about referred to an Australian study.

A That was the purpose of my writing the article — to refute the Australian study because it was so poorly done.

Q So your purpose in doing your study was —

A — to rectify the misinformation.

Q You would not want it though that an abortion was a complicated procedure, would you?

A I would like to have the medical profession know the truth about the abortion procedure because it is still a relatively new procedure and it is important that the scientific facts be assembled and be published.

Q You are not questioning the truth of the Australian study? You are not questioning the integrity of the people who made it, are you?

A Possibly.

Q Isn't it a fact, Doctor, that the reason for your study was [70] to further your own pro-abortion views and try to minimize the complications that attach to this procedure?

A No. I wanted to point out to the profession the hazards, and there are some, and the risks which really do exist. For example, if I may give you one, many of the regulations that were being set up were requiring the provision of blood facilities so that transfusions could be given to these girls, if necessary.

Well, our study revealed in 10,000 cases there were only three transfusions that were required and none of these were given during the first 24 hours, and a subsequent study, in which we reviewed 20,000 cases, pointed out the same fact, that it would be superfluous to require transfusion facilities in an out-patient clinic of this type because while it could occur, it was unlikely.

Q As to the complications, Doctor, you spoke of, do you regard these as being more likely in a younger woman?

A The risks are higher in the younger woman as a rule. May I add something to that?

Q I believe you have answered the question.

JUDGE ALDRICH: No, I don't think so.

A The risk of an abortion procedure increases with the parity of the woman regardless of her age. Parity is the number of pregnancies she has had. This is regardless of her age. That is one big factor. So that from that point [71] of view the young woman would have less risk.

However, the young, undeveloped uterus is harder to dilate. It is a harder procedure. The patients are perhaps not as cooperative. So that on the whole, the risks are higher.

Q Does the term morbidity mean anything to you in the context of abortion?

A Yes.

Q Does the term latent morbidity mean anything to you in the context of abortion?

A No. I don't know what you mean by that.

Q Would you explain what you mean by morbidity?

A Morbidity refers to infection, fever, the after-effects of a surgical procedure. Generally, it implies fever.

Q The complications that you spoke of, do any of those in your experience or from your own training and the literature, do any of those lead to sterility?

A No. They can, but very rarely, no more than a full-term pregnancy would.

Q But the risk is there?

A The risk is always there. Just living —

Q With regard to counseling, is there any special training that you imparted to the physicians you instructed?

A I hope that I did by example.

Q For example, did you recommend counseling be done [72] individually?

A It was done individually.

Q In your experience and training, would individual counseling be good medical practice as opposed to group counseling?

A It has been shown in recent studies that the teenage group responds better to group counseling because of peer pressure being so important in this age group.

Q You mean teenagers being counseled together?

A Yes.

Q You don't mean teenagers and adults?

A No, I mean teenagers. We did have an interesting study at Pre-Term, Washington. We tried to isolate groups of girls under 16 and they had both individual and group counseling and this was very effective.

Q You had both?

A We had both, right.

Q In your judgment, would it be good medical practice to have the group counseling done without any differentiation as to age, the wide spectrum of age?

A No. Women over 20 respond better to individual counseling. That has been shown fairly conclusively.

Q So in your judgment, it would be inappropriate to have a group of both minors and adults?

A Do you mean in the same group?

Q In the same group.

[73] A Yes. I think it would be quite appropriate.

Q You indicated, I believe, on direct examination that it is appropriate for the psychiatrist to play an active day-to-day role in clinic counseling; is that correct?

A It is desirable. It is not always practicable. There are not psychiatrists out in every little town all over the country, but if it is feasible, it is certainly desirable.

Q Why is it desirable?

A Because in any group of patients, you are going to have psychiatric problems where one needs more specialized help.

However, a very interesting study has just been published which shows that there is a higher group of psychiatric problems among the teenage pregnancies that elected to go ahead with their pregnancies than in the aborter group.

Q Yet there are psychological problems that existed in the aborter group?

A Yes. A comparison was recently made from Houston by Dr. Kane.

MR. BEHAR: I object to this.

JUDGE ALDRICH: All right, excluded.

Q In your judgment, should a pregnancy be terminated only for medical reasons?

A One would have to define medical reasons. By medical, if you include emotional, paychiatric, mental [74] well-being, I would say yes.

Q In other words, the mere fact that a woman or a minor is pregnant not in and of itself does not mean the pregnancy should be terminated?

MR. LUCAS: I object to this. This is foreclosed by the Supreme Court decision in Roe v. Wade.

JUDGE ALDRICH: You may answer.

A Obvioulsy not. Many of these patients wish to continue their pregnancy and are encouraged to do so.

Q Is the situation now in medical practice that if a minor gives any reason for wanting to terminate the pregnancy, that is acceptable?

A That is the normal, healthy reaction of the average teenager. She doesn't want to be pregnant. This is essentially a normal type of reaction. The ones who want to continue the pregnancy are the ones that need the psychiatric help.

Q The ones that want —

A The young teenager — I am talking about a single teenager who has not planned a pregnancy, who used no contraception, and finds herself pregnant. The normal reaction is

one of wanting to eliminate that pregnancy as fast as possible.

Q A minor who wants to get pregnant often does, doesn't she?

A I think very, very few teenagers want to get pregnant.

[75] Q Well, a minor who will not use any form of contraception and proceeds to have intercourse oftentimes might unconsciously or for some other reason want to get pregnant? That experience in the literature is clear, isn't it?

A That was in the literature in the past, but the more recent psychiatric literature would indicate that most teenagers do not have a hidden unconscious motivation to get pregnant and where they do have, these are the ones that do need psychiatric help. That is what I am saying. The average teenager who gets pregnant and has not planned it or wilfully so desired, the reason usually is due to society's failure to provide sex education and contraceptive information.

Our permissive society — it is a multi-faceted thing, the teenager herself, particularly the young ones, are not wholly to blame. Society is to blame for this situation.

Q Doctor, regarding the situation that we are concerned with here, informing the parents of a pregnancy, you have indicated it is beneficial to the minor to have the parents involved in this situation?

A Yes.

Q Would you state to the Court what those benefits are?

A Parental support is extremely important in any moment of stress. This is certainly a period of stress for these youngsters. They need all the help they can get.

Q Suppose the minor does not want to tell her parents she is [76] pregnant. Is there any reason she might give that is acceptable to you for not telling the parents?

A I try very hard to persuade the patient.

Q Let me ask you this. Is there any reason a minor might give for not telling the parents that you would not find acceptable?

A I would have to stop and think about that. I would use every possible means to persuade that patient that her parents would be more receptive to the fact than she possibly believes at the time. This is the usual reaction.

Most of these patients want to spare their parents. They may have very great love for them and want to spare their feelings or they have a great sense of guilt over having had sex, and that is why they are trying to shield their parents.

Q Suppose a minor gives as a reason for not telling her parents that she doesn't want them to know she has had intercourse. Would that, in your view, be an appropriate reason?

A No, of course not. I try to explain to the child that —

Q If the minor has no real reason but just a general reluctance —

A Most do not have a real reason.

Q Where there is no real reason, that would not be appropriate?

A No.

[77] Q Let me ask you something else. In your experience have you run across situations where a minor is reluctant to tell a parent because of reason X, whatever that might be, but does in fact tell the parents reason X and the fear of the minor about telling does not come true?

A That is the usual situation, I would say.

Q That is fairly common?

A That is the run of the mill.

Q As a matter of fact, if the minor's reason was taken at face value and the parents were not involved, that minor and her family would have lost the benefit of parental involvement, wouldn't they?

A That's right, but —

Q I think you have answered the question.

A You can get around this business of parental consent by persuasion with the youngster, but it takes time oftentimes and there are a lot who get away, who do not come to the right source, and they obtain services elsewhere, and this manner of delaying the procedure, I think, is something that we have to educate the public to the importance of treating —

MR. BEHAR: I move that this go out, Your Honor.

JUDGE ALDRICH: We do not have a jury here. We will deal with whatever answer you get. The answer may [78] stand.

Q Doctor, in the situation we talked about where the parents are involved and the fears of the minor are not realized, that situation is far more common than the situation where it would be inappropriate in your medical judgment not to tell the parents at all?

A Very much more.

Q Doctor, is it your understanding of accepted medical-legal practice that courts frequently become involved in resolving disputes between parents and minors?

A Yes. It happens rather frequently, not in my own experience.

Q Would you regard it as acceptable medical practice for a doctor or clinic, for example, to agree to the price of an abortion with a minor and to agree to perform the operation on the basis of a ten-minute phone call?

A No.

Q In your judgment, should a doctor be present when a consent form is signed?

A No.

Q Do you think a doctor should review the consent form with the patient?

A Of course.

Q That goes without saying?

A He should know whether or not it has been signed, yes, [79] and know the patient's attitude.

Q Would you agree with Dr. Sturgis — by the way, you were present during his testimony, were you not?

A Yes.

Q Do you agree with Dr. Sturgis that some gynecologists have other surgical interests in mind relative to performing, say, an abortion or sterilization?

A Yes.

Q Thank you, Doctor. In talking about the risk of pregnancy, you indicated that the risks were greater for minors under 18; is that correct?

A Yes.

Q Isn't is a fact, Doctor, that pregnancy in late adolescence is as safe as pregnancies beyond?

A No, it is not.

Q Isn't it a fact that the experience in other countries where customs and what-have-you are different than ours adolescence is an ideal child-bearing age, if you know?

A I think you could find many figures to argue that point.

Q But it is the fact in your experience and from your reading of the literature that some countries regard adolescence, for example, as an ideal child-bearing age?

A What do you mean by adolescence?

Q Sixteen through eighteen.

A No. I would prefer having a patient 21, if I could [80] choose. I would rather deliver all women between 21 and 25 rather than under 21.

Q That is what you would rather do?

A Yes, with my knowledge of the field.

Q You realize there are other views than this?

A Oh, yes, I am sure.

Q In your experience, Doctor, have you ever known of an abortion to be disruptive of the family, an abortion performed on a minor to be disruptive of the family?

A The pregnancy would be disruptive.

Q What about the actual procedure? Suppose the minor elects to go through the route of not having the child but having the abortion. Have you ever known the fallout from that procedure to be disruptive of the parents?

A Of course.

Q You indicated that 12 and 13 year olds were more in need of parental support than, for example, 17 and 18 year olds. Is that correct?

A On the whole, yes.

Q Will you tell the Court the reasons why that is so?

A I think that would be obvious to the Court — immaturity.

Q It is not obvious to me.

A The 12 year old needs more financial and emotional support. Many are simply babies at that age.

[81] Q It is quite clear that there is a correlation between age and emotional and intellectual maturity?

A Obviously. May I add something to that? At this age of 12 and 13, this is the group that often want to keep their pregnancy because they have no idea what a full-term pregnancy and parental responsibility involves. This is the group where you do need psychiatric help and where you do have to have parental involvement, if possible.

Q A trained psychiatrist, I assume?

A Yes.

Q That would be clear in your view?

A Yes, in that age group.

Q Have you encountered minor females in the age group 12 through 17 who could not give an informed consent in your judgment?

A Yes.

Q You indicated on direct examination, I believe, that the availability of elective abortion was accepted by national med-

ical organizations in obstetrics and gynecology; is that correct?

A Yes.

Q The acceptance by these groups did not really treat the situation we are confronted with here, the minor's situation and parental consent?

A Yes, there is a recent statement by the Association of [82] Children's Hospitals — the minor giving her own consent to an abortion.

JUDGE JULIAN: Is that available to the public?

THE WITNESS: Yes. It was published in February of this year. I believe, Mr. Lucas, you have a copy.

MR. LUCAS: Yes. When we get to the re-direct, we will introduce it. We have a number of extra copies.

Q In your view, is an abortion properly characterized as a surgical procedure?

A Yes.

Q In your experience has it been necessary for a physician who is about to perform an abortion to consult a family doctor as to some aspects of the medical history of a minor?

A It is often very desirable.

Q In your experience, Doctor, have parents ever been able to supply medical background for a minor that the minor herself could not supply?

A Very, very rarely.

Q In your judgment, are there any surgical procedures that a 17 year old could not give an informed consent to?

A Sterilization.

Q You would say in that situation a 17 year old could not?

A I feel that way intuitively.

[83] Q Would that be an appreciation for the consequences?

A Yes, that's right. I don't think most 17 year olds know how they are going to feel about reproduction at the age of

30. There might be extenuating circumstances in which a 17 year old could make that decision, but I wouldn't want to do the procedure.

Q If a 17 year old came in and said, "I would like to have a tubal ligation because I just don't want to bring children into the world", you wouldn't think that judgment ought to be followed through?

A No, I wouldn't want to do it.

Q Doctor, you personally have very strong views pro-abortion, don't you?

A Yes.

Q And you also have strong personal feelings on the subject?

JUDGE ALDRICH: I didn't get the question.

Q You also have strong personal feelings on the subject, do you not?

A I guess most people would think so.

Q And those feelings are completely in favor of the procedure, are they not?

A I abhor the procedure. I look forward to the day when we can eliminate it completely, if that day ever comes, but it is the lesser of two evils in our society.

Q In your judgment?

[84] A In my judgment it is the lesser of two evils.

Q Have you been able, in giving the various opinions you have given to the Court, to separate out your personal feelings from your medical judgment?

A I don't think that is possible.

MR. BEHAR: I have no further questions.

JUDGE FREEDMAN: Based on the questions regarding your medical opinion and your personal feelings, I would ask the further question: Are your personal feelings based upon your medical experience and judgment?

THE WITNESS: Entirely. I had quite opposite opinions 25 years ago.

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CROSS-EXAMINATION BY MR. REYNOLDS

Q Doctor, my recollection is you testified on direct examination to having supervised something on the order of 25,000 first trimester abortions of young women in the last two years?

A That is correct.

Q And approximately 11% of those were young women under the age of 18?

A Right.

Q Would that be about 12,500 each year?

A Well, perhaps, yes.

Q With regard to those young women under the age of 18, [85] in each instance you had received a parent's consent to perform the abortion; isn't that correct?

A The procedure was that the patient could bring in the parent's signature. There was no notarization of that signature. This policy was set up before I went to Washington, and there was no law on the books, no legal statute at that time, in the District of Columbia, requiring parental consent, and very recently a law has been passed eliminating the necessity for it.

Q During the time when you supervised these 25,000 abortions, and about 11% were under the age of 18, during that time a consent form, a written form, was required?

A Yes.

Q And whether or not they were actually signed by the parent, you don't know that?

A I doubt very much if they always were.

Q So as far as you know, there was no particular statutory requirement at that time?

A At that time, right.

Q But you wouldn't do it without the consent form being signed?

A Right.

Q Did you turn away any in that category, that is, under age 25, during that time for failure to obtain parental consent?

A We turned away a number every week, almost daily.

Q Let me ask you about those that were turned away. How [86] many within a week were turned away?

A I would estimate at least a dozen.

Q Did some of those return later on?

A Yes. Perhaps another dozen would be referred for psychiatric help or special counseling, but some of those came back. I can't tell you what percentage.

Q Based upon your own experience as a practicing physician, the vast amount of your practice with regard to abortions has included the requirement of parental consent?

A Yes.

Q You find that parental involvement in the decision is desirable?

A Right.

Q In your testimony you reported that some young women under the age of 18 did not have financial responsibility.

A I am sure there were.

Q Isn't it your experience that most, if not all, young women below the age of 18 are still in the process of acquiring an education?

A Yes.

Q And that most of those young women under the age of 18 who are not married make their home under their father's roof or mother's roof?

A Yes.

Q Isn't it so that you find there is a great capacity on the part of the parents who have a daughter in that group to be [87] understanding and to in fact be supportive and helpful?

A Yes.

Q You, yourself, are a mother of two daughters, as I recall your direct testimony.

A Yes.

Q One is a teenager?

A Yes.

Q As the mother of a teenager, you would, I assume, wish to be informed of any abortion decision she made?

A I would be, I am sure.

MR. REYNOLDS: Thank you, Doctor.

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RE-DIRECT EXAMINATION BY MR. LUCAS

Q Doctor, were most of your opinions on abortion formed at a time when abortion was illegal?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

Q At the time you formed your opinions, your pro-abortion opinions, you were not able to do abortions because they could not be done in medical practice?

MR. REYNOLDS: Objection.

MR. BEHAR: Objection. This witness has testified as to opinions, I assume, she holds today.

JUDGE ALDRICH: I think he is relating to the last two questions you asked on cross-examination. I don't [88] know why he can't bring out a time sequence on it.

Q When did you first form your opinions on the desirability of having elective abortions for minors?

A It is hard to pinpoint it. My feelings gradually evolved over the years by having been so frustrated in dealing with problem pregnancies of women of all ages, and I began to realize that our law was bad and that abortion services should be made available.

Q Was the issue of parental consent involved in the test case you brought in Minnesota?

A No.

Q Did you have anything to gain personally from eliminating the parental consent requirement?

A Nothing. It has never been a problem to me except it is a delaying factor. It is an impediment, one more impediment which may throw the teenager into the second trimester. that is my chief objection to it.

Q Has most of your experience at Pre-Term had to do with the requirement of one parent as opposed to two parents?

A Just one.

Q How would it affect the difficulty for the patient if you had to have the consent of both parents?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: That is the same set of [89] questions that has been asked on cross-examination. I consider the answer to both irrelevant — if not irrelevant for the case, irrelevant from the standpoint of the witness.

If that troubles you, Mr. Reynolds, it is harder to draw two aces in your poker hand than it is one.

Q Doctor Hodgson, if only one minor in the United States could not get parental consent, would that still interfere with obtaining an abortion?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q You indicated you have done some studying of the problem of psychological reaction to abortion versus delivery. Would you describe what your findings were on that subject?

A I was citing a work published recently from Houston by Dr. Kane, Chief of Psychiatry.

MR. BEHAR: I object. I believe the question was what she had found. Now we are dealing with some study she is referring to.

MR. LUCAS: The question had to do with her study of the literature.

JUDGE ALDRICH: Our problem may be answered in that respect because I think the defendants have asked both witnesses, and particularly this witness, about familiarity with the literature about a half dozen times. [90] You may proceed.

Q You may answer the question.

A This was a study of a group of teenagers who were pregnant. It compared the aborters with the non-aborters. It was interesting that the non-aborters, the girls that wished to carry their pregnancy to term, were the ones that really were psychiatrically disturbed, and in need of psychiatric help, and the authors concluded that we were concentrating our psychiatric services at the wrong place, that it was a normal, healthy reaction for the teenager to seek an abortion. It was not for them to attempt to continue the pregnancy.

Q Even with minors whose parents will give consent, does parental involvement as to consent involve delay?

A Yes.

Q Is one of the concerns of minor patients coming to a clinic the fear of parental reaction?

JUDGE ALDRICH: Didn't the doctor testify to that already on direct?

MR. LUCAS: She may have.

JUDGE ALDRICH: I thought so.

Q In your experience, have you encountered minors whose parents were gynecologists?

A Yes, very few.

Q Have you encountered minors whose parents were psychologists [91] or psychiatrists?

A A few.

Q I believe you indicated that you didn't think some minors could give an informed consent to tubal ligation.

A yes.

Q Is that in irreversible procedure gynecologically speaking?

A Yes.

Q Is an abortion an irreversible procedure?

A No.

Q Is it possible for a minor to come back and have a child a year later if she decides to do so?

A Yes.

JUDGE JULIAN: The abortion itself is irreversible.

MR. LUCAS: In terms of child bearing capacity — that is what I meant. I have no further questions.

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RE-CROSS EXAMINATION BY MR. BEHAR

Q In the rare situation sterility results as a result of complications from an abortion and then the procedure is irreversible relative to future childbearing?

A Yes.

Q Do you agree with Dr. Sturgis that a mid-trimester abortion is safer than a first trimester abortion?

A No. I do not. I don't think Dr. Sturgis made that[92] statement.

JUDGE ALDRICH: I don't know about Judge Julian, but Judge Freedman and I do not remember him saying that.

MR. BEHAR: I was surprised by the answer.

JUDGE ALDRICH: I would have been surprised if I had heard it.

Q As a parent, do you have any idea how you would feel if your daughter went and had an abortion without your consent and you discovered it later?

A I would feel I had failed as a mother, although it would depend on her motives. Possibly she would want to protect me, but I don't think it would happen. I feel my communication is better with my daughter than that. I think I would be the first one to know.

Q You indicated that the parental consent law in your view was an impediment.

A From the standpoint of time it is an impediment, yes.

Q There is no question about the principle?

A No question about the principle, no.

Q As far as time goes, if you have a situation where a minor is ambivalent as to the procedure, isn't it going to take time to resolve that ambivalence?

A Yes. In the case of ambivalence, no one would want to do the procedure on an ambivalent.

[93] Q Where there is a judgment by the physician that the minor might not really understand what is going on, it is going to take some time to work those things out?

A Obviously.

Q And it is going to require, as you indicated, a trained psychiatrist to resolve it?

A Right. Some of the delays are absolutely necessary.

MR. BEHAR: I have no further questions.

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RE-CROSS EXAMINATION BY MR. REYNOLDS

Q Doctor, did Dr. Sturgis testify that the second trimester was simpler rather than safer?

A I believe that is right.

Q Would you kindly identify the study to which you have made reference?

A Which study?

Q The recent one that was published.

A About comparing the aborters and non-aborters?

Q Yes.

A That is in the American Journal of Psychiatry for 1973 entitled "Teenage Pregnancies - Aborters versus Non-Aborters" or something like that, by Dr. Kane.

Q Would that be October of 1973?

A Right.

MR. REYNOLDS: Thank you.

[94] MR. LUCAS: I have enough copies for the Court and counsel. I would like to have this marked.

MR. REYNOLDS: May I inquire what this is being marked for?

MR. LUCAS: For identification at this time.

(Plaintiffs' Exhibit 8 for Identification.)

Q Would you please identify that document, Dr. Hodgson?

A This is the release of a statement made by the National Association of Children's Hospitals and Related Institutions.

Q Is the statement itself attached to it?

A Yes. Pediatric Bill of Rights is attached to the news release. I believe it is a news release.

Q Is that a true and accurate copy of the Pediatric Bill of Rights, as far as you could tell?

A Yes, it is.

Q Is it a nationally accepted policy statement with regard to medical treatment of minors?

A I hope it would be nationally accepted. It is still relatively new.

MR. LUCAS: I would like to move the admission of this exhibit as evidence of national standards with regard to medical treatment of minors.

MR. REYNOLDS: I object to it. I think it is an unusual procedure to introduce this on re-direct.

[95] JUDGE ALDRICH: Well, it might help me a little. Does this relate to the cross-examination?

MR. LUCAS: It does. It was brought up on cross.

JUDGE ALDRICH: That is what I thought. I thought the doctor was cross-examined at some length on this or, rather, she answered at some length, perhaps unexpectedly from the standpoint of the examiner.

JUDGE JULIAN: This purports to be the National Association of Children's Hospitals and Related Institutions, Inc. I don't know what this corporate entity is or what particular type of institution it is or what it encompasses. For all I know, it may be a corporation with one or two or three hospitals involved in it.

JUDGE ALDRICH: We won't take it. Return it, please.

Are counsel through with this witness?

MR. REYNOLDS: I am.

MR. LUCAS: Yes, Your Honor.

JUDGE ALDRICH: Two o'clock.

(Recess)

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[96] (AFTERNOON SESSION:)
(2:00 P.M.)

MR. BEHAR: Professor Nadelson, please.

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CAROL NADELSON (RECALLED)
CROSS-EXAMINATION BY MR. BEHAR

Q Would you please restate your name for the record?

A Carol Nadelson.

Q Is it your view, Doctor, that a woman who is faced with a decision as to whether to have an abortion needs counseling by knowledgeable, experienced people who are able to explore the alternatives with her objectively and sensitively?

A Yes.

Q Is counseling by knowledgeable, experienced and objective people even more important?

MR. LUCAS: Objection. I would like a definition of knowledgeable and experienced people.

JUDGE JULIAN: He appears to be reading something. Are you reading from the testimony given in the case hitherto?

MR. BEHAR: No, I am not.

JUDGE ALDRICH: Would you clarify what you mean?

MR. BEHAR: I am referring to a letter this witness has written to a newspaper.

[97] JUDGE ALDRICH: All right. The objection is overruled.

Q I ask you, Doctor, is counseling by knowledgeable, experienced and objective people even more important in the situation of a minor?

A Yes.

Q Why would that be?

A I think minors are a higher risk, in terms especially of repeating the same situation, if they do not have adequate counseling.

Q This repetition is a standard psychological phenomenon, repetition compulsion?

A No.

Q That is not what you are referring to?

A No.

Q Why should there be counseling at all relative to an abortion decision?

A I think people need to be aware of all of the alternatives that face them and the implications of each of them as well as what future alternatives there are for family planning, etc.

Q You don't routinely counsel every minor who is going to have an appendectomy at Beth Israel?

A No.

Q Why is this particular procedure singled out?

A It is difficult to have two appendectomies. It is a [98] procedure that happens once. That does not have anything to do with one's choice in the matter of getting pregnant.

Q It is the possible frequency of recurrence that requires counseling. Is that what you are saying?

A That is one aspect of it, yes.

Q Are there other aspects?

A Of pregnancy?

Q Of why counseling at all.

A Because counseling usually occurs in a setting of some kind of either internal psychological or family turmoil or sometimes it results from external pressure which adolescents may not be able to understand completely or cope with.

Q If I were to characterize counseling as non-directive and exploratory, would you know what I meant?

A I would, but I don't know if anybody else would.

Q Would you explain what those terms mean to you?

A I assume what you are talking about is counseling where the counselor asks the person to describe and discuss what her feelings are and how she understands her situation, and talks about why it happened and what happened without the counselor intervening with the counselor's value judgments.

Q That is correct. That is what I was referring to. Doctor, in your judgment, is this kind of non-directive, exploratory counseling the kind of counseling that you give in the abortion [99] context?

A That is one aspect of it.

Q That is one aspect. Are there others?

A There are times when a teenager has to be counseled in terms of contraceptive use, which is fairly direct and explicit.

Q But that is the contraceptive situation.

A That is all part of the counseling situation though.

Q As to the aspect of counseling that concerns abortion, you would say that good medical practice would be to engage in exploratory and directive counseling?

A I am afraid we are not on the same wave length about this. I don't quite understand.

Q In the abortion situation, is it important for the counselor not to interject his or her own views in the matter?

A Yes.

Q Is didactic counseling in your opinion improper medical practice in the situation?

A I believe that I said that a certain aspect of counseling is directive. Since it involves what occurs when one has a pregnancy and one has an abortion, those are facts that one should be able to communicate in the counseling situation, so they are directive.

Q Besides explaining the procedure, and we're dealing with an emotional issue that might be at issue, is it fair to say that [100] good medical practice would not require didactic counseling?

A Would you define didactic?

Q Getting across the counselor's point of view.

A That is different than didactic. You mean the counselor's point of view?

Q Yes, that's right.

A I would say that one should not intervene with one's own point of view.

Q What are the possible detrimental effects of counseling where the counselor's point of view is projected upon the minor who is confronted with an abortion decision?

A That would be to put the minor in the same situation as the minor is often put in at home, which is that somebody else is just telling the person what to do, and they don't have any sense of what it is that the issue means for them or what they need to do in that situation.

Q Do you have an opinion as to whether a person who has strong moral feelings against abortion could be an effective counselor?

A I think that person can be if that person is aware of those feelings and has been careful not to allow them to interfere in the situation. I would doubt if it happened, but it is certainly possible.

Q You have indicated that counselors should be knowledgeable.

A Yes.

[101] Q What do you understand a knowledgeable counselor to be?

A A knowledgeable counselor is someone who has some familiarity with basic psychological principles, who knows something about interview technique, who has familiarity with the developmental issues at any age, and knows something about pregnancy and contraception, and who knows something about the indications and contra-indications in the situation.

Q You, yourself have had training in this regard?

A Yes.

Q It is possible to get training?

A Surely.

Q Here in Massachusetts?

A Yes.

Q Can you give us some schools where this kind of training is available?

A We certainly train our people at the hospital. These are staff people who do counseling, social workers, for example, and the Planned Parenthood certainly does an excellent job.

Q Educational facilities?

A Do you mean universities?

Q Well, is it possible to get formal training to be a counselor?

A By formal, what do you mean?

Q Associated with a school.

[102] A Do you mean to get a bachelor's degree or something like that?

Q Or to receive instructions from courses at a school in these kinds of counseling techniques we are talking about.

A Do you mean in abortion counseling?

Q That's right.

A Not that I know of.

Q When you use the term abortion, are you referring to any particular trimester?

A I wasn't at the time.

Q Were you referring to all trimesters?

A I was referring to the time when one does abortions, which is within the first and second trimester.

Q So you are not referring to the third trimester in any circumstances?

A No.

Q Just the first two?

A Yes.

Q Does the term abortion center have any meaning for you?

A Abortion center?

Q Yes.

A I suppose what you would mean would be a place where people do abortions.

Q Does Beth Israel have a policy regarding the performing of abortions on minors relative to parental consent?

[103] A I can answer more specifically up until last January. There have been some changes. The policy has always been the same as for any operative procedure which requires parental consent for any minor.

Q Is this a written policy at the hospital?

A I assume it is.

Q You indicated on direct testimony that parental consent can cause delay in this procedure which could cause some sort of emotional upset in a minor.

A Yes.

Q Isn't it a fact, Doctor, that if the situation is hurried in some cases, that that can lead to a long-term unfavorable resolution of a minor's dilemma?

A I think you are posing two situations that are difficult to untangle. In the situation of a pregnancy one is weighing one risk against another.

Q Let us take the situation where the physician has the feeling that the minor does not appreciate what is going on, the minor who desires an abortion.

In your view, if that decision is hurried, isn't it likely that there would be long-term detrimental effects to that minor, if the decision is hurried?

A Again, it depends on what you mean by long-term detrimental effects.

Q Let's say a week.

[104] A A week's delay? Well, if it were a 19 week pregnancy or 20 weeks, then a week would make it very difficult. If you were at 12 weeks and you were going into the 13th, you would be weighing the physical risk against an emotional risk.

Q Doctor —

JUDGE JULIAN: It would be better if you did not interrupt the witness. Would you continue, Doctor?

THE WITNESS: What I was referring to was that one is never making a clear-cut decision on the basis of one factor. One always has to consider all the issues involved. If the minor has to have a saline abortion rather that a suction abortion, there is a physical as well as an emotional difference, so it would depend on what the particular circumstances are.

Q If the physician senses an ambivalence on the part of the minor, would it be in the best interests of the minor to rush the abortion decision with that kind of analysis of her situation?

A It would not be unless there were some other extenuating circumstances.

Q How is the counseling done by you at Beth Israel Hospital? Is it individually?

A Yes.

Q Is there any group counseling?

[105] A There is none.

Q Do you have an opinion as to whether group counseling, where minors and adults are intermingled, would be acceptable medical practice relative to a minor faced with an abortion decision?

A I would think it would be rather difficult.

Q How much time do you spend with a patient counseling her?

A As a counselor?

Q Yes.

A I do not do counseling at this moment.

Q You did, though, in the past?

A Yes.

Q What was the time that you spent individually with your patients?

A I usually spent at least an hour with each person.

Q Do you regard that as a basic minimum requirement, that kind of contact, over a period of time?

A I would think so, except that is not the only part of the counseling procedure.

Q So there is more beyond the hour?

A Yes.

Q There is more beyond the individual hour of the doctor-patient contact?

A Yes.

Q Did you do a psychiatric evaluation under the older law in [106] Massachusetts?

A Yes, I did.

Q Did you ever refuse to recommend a patient for an abortion under the old law?

A Yes.

Q Can you indicate the reasons for that refusal?

A It is difficult to think back on a specific instance. Most of the time, as I recall, and I can't be terribly specific, it was related to the person's ambivalence and my feeling that the person was not sure about what they wanted or, in fact, wanted something else. This is more often true in minors than in adults.

Q Do you encounter minors who have some ambivalence as to the abortion procedure because of religious reasons?

A Sometimes.

Q Can you be illustrative of what kind of situations you come in contact with?

A It most often involves a family issue where the teenager believes her family feels one way and she feels the other way and she is afraid of what will happen in her family situation. That is usually what one sees.

Occasionally, one sees a teenager who is troubled about the morality issue, but that is not as frequent as the former. By the time we see people, usually they have thought about it a great deal. They do not make an instant, [107] impulsive decision.

Q I take it that some of the counseling you do is on contraception?

A Yes.

Q Do you think it good medical practice in counseling a patient, who may or may not have religious concerns about abortion, to refer to the rhythm method of contraception as "Birth Control Vatican Roulette"?

A Do I personally? No, I don't.

Q Do you think it good medical practice, consistent with objective counseling, to refer to the Pope's pronouncement on abortion by stating that his concept of solving the problem is rather backward?

JUDGE ALDRICH: Do you think this is pertinent cross-examination?

MR. LUCAS: I object. It is beyond the field of proper cross-examination as to the rights of minors.

JUDGE ALDRICH: I am asking Mr. Behar. Do you think this is pertinent cross-examination?

MR. BEHAR: I think it is pertinent to establish what is good medical practice in the counseling situation.

JUDGE ALDRICH: Choice of words, semantics, language? What has it got to do with medical practice?

MR. BEHAR: There has been testimony from every witness that we have had that counseling is an important [108] part of this situation and that objective counseling is

necessary, and I suggest that when some of the named plaintiffs take the stand, we might find some of the counseling that has been given is not exactly that.

JUDGE ALDRICH: That may be so, but that is not presently before us.

MR. LUCAS: We would submit to you —

JUDGE ALDRICH: Your objection is sustained.

Q Does psychiatry break down life into developmental periods?

A It doesn't specifically deal with that issue except psychologically.

Q Well, to the extent that it deals with it psychologically, is it fair to say there are developmental periods?

A Yes.

Q This is standard psychological and psychiatric methodology?

A Well, yes.

Q For the ages 11 through 18, are there any specific developmental periods that you can isolate?

A One usually refers to that as adolescence or pre-adolescence. The beginning and the end of adolescence are really not clearly definable. One can use a chronological model or one can decide on the basis of physical maturity. It really is variable.

Q But it is standard psychiatric and psychological methodology to segment that area of life into developmental periods?

[109] A Yes.

Q There is early adolescence?

A Yes.

Q And there is later adolescence, is there not?

A Yes.

Q Isn't it a fact, Doctor, that in a given developmental period there are different psychological and emotional goals?

A Yes.

JUDGE JULIAN: Some what?

MR. BEHAR: Goals, g-o-a-l-s, psychological and emotional goals.

JUDGE ALDRICH: I'm sorry, but I still don't have the word.

MR. BEHAR: Goals, g-o-a-l-s.

JUDGE ALDRICH: Thank you.

Q What would be in your judgment some of the psychological and emotional goals in early adolescence?

A I would look at adolescence as a developmental spectrum where there are certain goals for the whole period and the dividing of adolescence into early and late is a kind of convenience which has to do with the kinds of problems adolescents at those ages have with the goals.

If you are referring to the whole process, there are several major tasks.

Q What would they be?

[110] A They would be the beginning of separation from parental and family ties and the beginning of forming one's own individual identity and one's own goals. Included in that would be social identity and a whole variety of other kinds of personal issues that the adolescent has to work toward.

Q You indicated that the use of the terms early and later adolescence was more a convenience for problems that are associated with a particular age group. Is that right?

A Yes.

Q You nod your head. Is that correct?

A Yes.

Q Isn't it a fact that depending on age, there are different psychological problems that occur?

A Yes.

Q And they are associated with an age group, isn't that the case?

A Yes.

Q Doesn't the fact that psychological methodology breaks down life into developmental periods indicate that there are different degrees of maturity that could be associated with that?

A It depends really on what you mean by maturity.

Q Well, wouldn't you say that the fact we are dealing with, different developmental stages, indicates different degrees of maturity at those stages?

[111] A An adolescent at 13 acting like a 13 year old who is mature.

Q As to one's personal identity and sexual identity, doesn't an abortion have a great impact on those goals, on the realization of those goals?

A There is not much evidence of that.

Q You would disagree with that?

A I would say I really don't know, but there is not very much evidence that that is so.

Q Do you regard an abortion as a potential trauma to the goal of realizing independent gender identity?

A Well, I would have to find out a little bit more about what you really mean.

Q What is it that you don't understand?

A Well, it doesn't have much to do with gender identity. The whole issue of having a pregnancy in the first place is more direct than the end result at that point.

Q The resolution of the pregnancy clearly has an effect on the developmental goals, is that correct?

A Yes.

JUDGE JULIAN: What effect does it have, in your opinion?

THE WITNESS: I think it makes a change in a person's usual life. For example, if a minor continues her pregnancy, she would no longer be an adolescent but a [112] mother.

In addition, that would be a major role shift for her and a big developmental change.

JUDGE JULIAN: If there is a termination of pregnancy, what effect does that have?

THE WITNESS: Termination of the pregnancy might have an effect depending on what it means to her and how she has settled the issue that caused her to be pregnant in the first palce.

JUDGE JULIAN: So there is no answer?

THE WITNESS: No specific answer. It is very individual.

JUDGE JULIAN: Is it because there is a lack of data on the subject?

THE WITNESS: Well, that is one part of it, yes. There is a lack of specific data on teenagers who have had a pregnancy terminated by abortion. There are one or two studies in the literature on the subject. However, I think it is also related to the specific individual and the family dynamics of each case that makes it difficult to give a generalized answer.

Q Isn't it the case, Doctor, that a decision to continue or terminate a pregnancy can be made on many levels?

A Yes.

Q What are some of those levels?

A A person could certainly make a decision that is overt [113] and can say one thing and mean something else. They can certainly be ambivalent, which is characteristic of adolescence anyway.

Q In counseling the minor, do you regard it as important to determine what level the decision is being made at, in a situation where a minor desires to have an abortion?

A I am sure she really understands and wants it versus whether she says one thing and really means another. Yes, I think that is very important.

Q Why is that?

A Because I think if a minor is not at least as certain as a minor can be in such a situation, then she may be ambivalent at another point about the choice she made.

Q If, in fact, there is ambivalence and it is not detected, that can have an adverse consequence for the later development of the minor?

A There is always ambivalence, I think you know that, in every decision, and adolescents are particularly prone to be ambivalent about everything. One has to do the best one can given the situation.

JUDGE FREEDMAN: The mature adolescent, a person 17 or thereabouts, are you saying she is inclined to be ambivalent?

THE WITNESS: It is more common in younger adolescents to be ambivalent about many things. That is [114] part of the developmental process — to have to sort out and learn how to make decisions, and it is very difficult to make a decision, and as adolescents get older, they become better able to do that, and the age variation has to do with the individual variables for the case, but a 17 year old will generally be more able to make a less ambivalent decision that a 13 year old, although there is a wide variation.

JUDGE JULIAN: When you use the word ambivalent, are you giving it the same meaning as uncertain?

THE WITNESS: Yes.

JUDGE FREEDMAN: Do you agree with an earlier witness who stated that the age factor is not as important as the maturity of the individual that is being treated?

THE WITNESS: Yes. I think one can find a 13 year old who is better able to make a decision than a 17 year old.

JUDGE FREEDMAN: Under certain circumstances?

THE WITNESS: Yes.

Q You refer to the situation of the unwanted pregnancy as a crisis situation.

A Yes.

Q Is that a psychological term?

A Yes.

[115] Q What does that mean?

A Well, in the specific instance that I believe you are referring to, it is generally the first time in an adolescent's life that she has had to face a decision where there is a permanent life-long effect and where she has to determine a life goal that may well be immutable.

Q I believe you described the minor in this situation by a variety of terms such as being upset and anxious; is that correct?

A Yes.

Q Is it your testimony that a minor in this situation should be alone in her situation?

A One would hope she would not be.

Q Clearly, she should not be left just to flounder with her fears and anxieties?

A Certainly not.

Q It is certainly the case, Doctor, that parents are typically the ones who are most suited to provide support in this situation?

A Some are and some are not.

JUDGE JULIAN: But generally speaking they are, Doctor?

THE WITNESS: Well, it depends on which population you are talking about. I think one has to be careful about what one really means by parents and what population [116] of people you are talking about. If you look at the people —

JUDGE JULIAN: In our society —

JUDGE ALDRICH: She hasn't finished.

JUDGE JULIAN: She is not answering the question put to her. Would you read the question?

(The following question is read:)

"Q Isn't it the case, Doctor, that parents are typically the ones who are most suited to provide support in this situation?"

JUDGE JULIAN: In our society, speaking generally, as a general proposition.

THE WITNESS: I could say yes. I would really have to qualify that because I think that is an ideal situation. It does not often refer to parents who are in their own stressful situation, who have difficulty with their parental role at certain times of their life or under certain circumstances and they may at times be the worst people that on could talk to because they are so upset.

Q Doesn't any surgical procedure involve some possible psychological problem?

A It can, yes.

JUDGE ALDRICH: I can't hear you, Doctor.

THE WITNESS: It can, yes.

Q There is a natural reaction against invasion of the body, is there not?

[117] A I don't know what you mean.

Q An antipathy to having the body invaded in a surgical procedure.

A Physically or emotionally?

Q Physically.

A Physically, yes.

Q With emotional ramifications?

A Well, it is a stress.

Q Isn't termination of pregnancy really a double psychological problem because you have the typical stressful situation of any surgical procedure plus the interruption of the pregnancy?

A Well, that is a complicated question. It is the same kind of stress as a surgical procedure is. It depends on what the meaning of pregnancy is to the individual, whether that adds to it or not.

Q So it can be a double problem?

A It can be.

Q But need not be?

A But need not be.

Q In your view, should there be any time lapse between counseling and the abortion?

A By time lapse, you mean what?

Q Giving the patient a chance to think things over.

A Well, it would be best if one did not have to rush, yes.

Q Ideally, it is important to have some sort of leeway between [118] the counseling and the actual procedure?

A Yes.

Q In your counseling do you discuss possible psychological reactions to abortion with the minor?

A What are you referring to specifically?

Q Maybe a sense of guilt, a sense of sadness. Do you discuss these as being possible reactions to the experience?

A Yes.

Q Is it important to discuss those kinds of feelings?

A I think it is important, but I think that one has to maintain a perspective about it depending on the individual.

Q But there are individual situations where it would be important to say, "You might feel sad; you might feel guilty"?

A True.

Q In your opinion, Doctor, do the psychological problems that follow abortion occur more dramatically in the young than in older women?

A Well, there is no direct evidence that I can quote to you on that because so little work has been done on it. My impression is that it does not have to do with the age as much as the particular circumstances and the appropriateness of the resolution.

Q In your experience, Doctor, do minors tend to tell a doctor what he wants to hear in the situation when confronted with an abortion?

[119] A Again, I can not answer that as directly as perhaps you would like. It depends on the particular circumstances and what the role of the doctor is in that situation.

Q Isn't there a feeling that many adolescents are happy to have somebody involved in running the show, they come in contact with a doctor and they're happy to have some older figure involved?

A That is sometimes the case. That isn't what I was referring to.

Q What were you referring to?

A In the situation where the doctor is the person who has to make the decision, as under the old rule, as to whether there was some, you know, major reason for an abortion, and you were more likely to have somebody tell you what she thought you wanted to know than one is when they have some more freedom of choice.

Q You have indicated that generally parental involvement is a desirable situation?

A Yes.

Q Does that go for the minor and the parent?

A Yes.

Q Could you elaborate for the Court what the benefits are to both the minor and the parents when they are involved?

A I think it is very important for a minor to have parental support and somebody with her. It is a very [120] important part of feeling loved and cared about, especially if the pregnancy occurred in the context of some question about that, and I think it is an important part of building a relationship between teenagers and their parents or between any two people who have to go through a crisis together. It can really strengthen the relationship.

Q The fact that there might be some reluctance or ambivalence about informing the parents, and the fact that there might be emotional upset when there is information given to

the parents, does not mean that the family can not grow from that experience?

A It depends entirely on the situation.

Q You have known families to in fact grow from the experience?

A Yes.

Q You have indicated that parental involvement is even encouraged at Beth Israel. How is that done?

A Generally, what we do with the teenager is to have a child psychiatrist see her as the counselor, and occasionly we alter the procedure some, and the social worker generally sees one or both parents, depending on what seems to be the wish and the indication, and then often they will be together to talk about where they are going and what is happening, and occasionally they will meet after also.

Q If the minor is reluctant to inform her parents that she is pregnant, is it important to find out why she is reluctant?

[121] A Yes.

Q Why is that?

A I think it is important to have them available if there is any possibility of strengthening the relationship between them, if one thinks there is a benefit.

Q So merely because the minor says, "I don't want to inform my parents I am pregnant" does not mean that the matter should be dropped right there?

A I think one should find out why.

Q Have you encountered situations where minors were reluctant to inform their parents because of particular fears and the fears were not realized?

A Yes.

Q What kind of fears did the minors express that were ultimately not realized?

A Often minors are fearful of being severly reprimanded or

ostracized or punished by their parents. Those are the most frequent fears.

Q And when the parents are informed, these fears are not realized?

A In some cases.

Q Would you say, Doctor, that the incidence of those cases where the fears are not realized is greater than the situations where parents should not be informed?

A Yes.

Q That is clearly the case, right?

A Well, I can't quote figures.

JUDGE JULIAN: Clearly what?

MR. BEHAR: I asked if that was clearly the case.

JUDGE ALDRICH: If what was?

MR. BEHAR: If the incidence where the fears of the minor were not realized were greater than situations where the parents should not be informed.

JUDGE ALDRICH: I don't understand the question.

MR. BEHAR: The witness has answered the question.

JUDGE ALDRICH: Then we will have to find out what the witness understood by the question. When I first heard the question, and Judge Julian and I had the same trouble, I thought you were being asked: when the parents ultimately did learn, whether it was more often the case the fears were not realized then the fears were realized. When I heard the question rephrased or repeated, he is comparing it with cases where the parents were not informed at all.

I don't know how you could compare oranges and lemons.

THE WITNESS: I understood it the way you did.

Q The way the Judge did — that would be your answer?

[123] A Yes.

Q You indicated there were situations where in your judgment the parents should not be informed?

A Yes.

JUDGE ALDRICH: The answer was what?

THE WITNESS: Yes. Q I would ask you, Doctor, whether the incidence of that situation where the parents had not been informed in your judgment is greater than the incidence of situations where the minor's fears were not realized?

A That is complicated. As I understand it, you are asking me to kind of categorize frequencies.

Q That's right. You said you have encountered situations where the fears of the minor are not realized. That occurs with a certain frequency?

A Yes.

Q Then you said that you have encountered situations where you would not want to inform the parents of the minor's pregnancy?

A Yes.

Q Which of those two situations have the greater frequency?

A Well, it is more often the situation where the fears are not realized. I could not give you the figures on that.

JUDGE JULIAN: I would like to put this question to the witness. Doctor, have you had many [124] instances involving a teenage pregnant girl, when the abortion has been performed, without the knowledge or consent of the parents, assuming she has parents?

THE WITNESS: Invariably at least one parent is involved.

JUDGE JULIAN: Have you had any cases where the operation was performed, the abortion was performed, without the consent of either parent?

THE WITNESS: We have had that happen.

JUDGE JULIAN: How many cases have you had?

THE WITNESS: I can't be specific, but —

JUDGE JULIAN: Approximately.

THE WITNESS: I think probably in our hospital it must happen four or five times a year.

JUDGE JULIAN: To your knowledge?

THE WITNESS: Yes. I can not be specific because I do not make the final decision. It is up to the chief of the obstetrics and gynecological service to work with the hospital lawyers, so that it is beyond my contact. I wouldn't know.

JUDGE JULIAN: You really don't know then?

THE WITNESS: I can't be more specific than that.

Q Doctor, in situations where you come in contact with minors and you sense an unstable family situation, have you or the [125] hospital petitioned the State Agency to have a guardian appointed?

A I can't be specific about the legal procedures. I am asked to evaluate someone. If there is the possibility that parental consent should be waived, if the adolescent says, "I will not" or "can not" or whatever, then that becomes part of the evaluation, and then I make a recommendation, and it is acted upon in a certain procedure that has nothing to do with me any more.

Q Is this being treated as an emergency? In other words, I thought you said that no surgical procedure is performed at the hospital unless there is parental consent. Are you saying now that the hospital makes an exception?

A For any kind of procedure where parental consent may not be obtainable.

JUDGE FREEDMAN: This happens four or five times a year?

THE WITNESS: Yes, in this situation.

JUDGE JULIAN: This is where the consent is not obtainable?

THE WITNESS: As I understand it, some kind of waiver is requested but I can not be specific on it.

JUDGE JULIAN: Are you referring to cases where an attempt was made to reach the parents but they could not be reached? Is that what you are talking about?

[126] THE WITNESS: No. Usually it has to do with particular circumstances. I recall one youngster who had a mother in a mental hospital and a father who was an alcoholic and was not available, and she had a brother who was over 21 at the time — this was several years ago — and that was the legal age, and I don't know how the procedure occurred, but he assumed a kind of guardianship and not the parents.

I think that our hospital lawyer can tell you more about how that works.

Q Oftentimes a minor might find it extremely unpleasant to have to inform her parents she is pregnant?

A Yes.

Q Yet that does not mean it is not in her best interest to inform the parents; isn't that so?

A Yes.

Q You testified in some instances it would be harmful to the family relationship if the parents were informed of the minor's pregnancy.

A Yes.

Q Do you have an opinion as to whether it would be more harmful if the parents were informed of the pregnancy as a result of the minor being hospitalized for complications?

A I don't think I can answer that question. Can you [127] clarify it?

Q In a situation where an abortion is performed upon a minor without parental consent and there are complications and the minor is hospitalized and the parents are informed of the reasons for the hospitalization and hence the pregnancy, do you have an opinion as to whether that would be more harmful to the family if the parents learned in that situation?

A I think it is really something that can only be individually determined, but certainly it is one of the considerations that one weighs and discusses and attempts to resolve in allowing such a procedure to occur.

Q You could see how that could be particularly damaging to the family?

A It could be, yes. It is conceivable, but I don't think it is usual.

Q You don't think what?

A It is not the usual situation.

Q In the unusual situation there is a clear potential for harm?

A You are talking about potentiality.

Q Pregnancy carried to term doesn't have to be detrimental to the minor's well-being, does it?

A It doesn't have to be.

Q It may potentially be, right?

A Well, yes.

Q With regard to the age groups we are talking about, 12 [128] through 17, for example, have you encountered minors in these age groups who you felt could not appreciate the medical procedure of an abortion?

A Not after it was explained to them.

Q You have found that everyone could appreciate —?

A No. People have varying capacities for understanding and one has to work harder with people who do not understand as much.

Q In your experience, Doctor, have you ever encountered any minors in the age groups we are talking about who in your judgment could not give an informed consent to this procedure?

A I personally have not. It has happened when someone was defined as mentally retarded.

Q That is the only situation you would posit in your experience?

A In my experience that was the only time I can clearly say that.

Q When you indicated that for minors — that a majority of them were capable of giving an informed consent, doesn't your answer indicate that there is a minority who can not?

A It depends on how one approached the problem. It is a very complicated problem, but if one spends time explaining and informing, then you are doing a different thing than asking someone to make a decision with no information. So that in our situation at the hospital, we work very hard at dealing with the informed consent issue.

[129] Q In your situation at the hospital, it is medically speaking the optimum situation?

A I think it probably is.

Q You are an experienced psychiatrist, right?

A Yes.

Q You have the resources of a teaching hospital?

A Yes.

Q You indicated that in your experience one per cent of the minors had an adverse psychological reaction to an abortion?

A Yes.

Q Isn't that figure very low when compared to the literature?

A The range in the literature is one to thirteen per cent.

JUDGE JULIAN: What is that again?

THE WITNESS: The range in the literature of adverse effects is between one and thirteen per cent, depending on the study, who did it and what they looked for. In minors there is little data, one could hardly even say.

The one reasonably complete study that I know about had a very low incidence. Something like thirteen per cent was

their figure of minors who felt somewhat uncertain that they had made the right choice.

Q The figure that you gave is low?

A That is the figure we would estimate from our work.

Q In your work, you are dealing with a situation where you have [130] parental involvement, as you have testified to before?

A Yes.

Q That might be one reason for the low figure?

A But sometimes one parent and not both.

Q I understand. In your experience is impulsiveness a characteristic of adolescence?

A Yes.

Q Isn't that one reason why parental involvement in important decisions in their lives is important?

A Again, I have to give the same qualification as I did before. I think, yes, it can be, but one has to backtrack onto the issue how they got pregnant in the first place.

Q There are other crises in the adolescent's life, aren't there?

A Yes.

Q Besides the unwanted pregnancy?

A Yes.

JUDGE JULIAN: I did not hear your question.

Q There are other crises in the adolescent's life besides the situation of an unwanted pregnancy?

A Yes.

Q In those situations, isn't it uniformly desirable to have the parents involved?

A Well, I think it depends on the situation, but if a kid gets flunked out of school and the parents are very achievement oriented, they may have a very terrible time with that [131] and be very punitive and they may need some other counseling intervention to help work it out.

Q But still the principle would apply as a general proposition that in a major crisis in the adolescent's life, the parents are necessary?

A Yes.

Q In the situation where you have reluctance about involving the parents, as I understand it — well, is this a situation that is a typical one sociologically?

A When you are talking about parents, I am not sure whether you are referring to a parent or two parents. We see many teenagers who have one parent. The other one is unavailable for one reason or another.

Q Is that a typical situation?

A In our experience it is fairly common.

Q You do have the one parent available?

A One parent, yes.

Q In your judgment is there a difference, Doctor, between understanding a surgical procedure and appreciating the emotional situation?

A Yes.

Q Is it fair to say that with regard to younger adolescents the emotional appreciation may be entirely lacking even though there may be an intellectual understanding of the operation?

A Well, that could be.

[132] Q In your experience, has that been the case?

A No, not very often.

Q But it has occurred?

A Yes.

Q Doctor, isn't it fair to say that you have consistently taken a position in opposition to any State regulation in the area of abortion?

A No.

Q Haven't you, in fact, consistently urged the repeal of all legislation regarding abortion?

A No.

Q Haven't you joined in newspaper ads urging the repeal of the Massachusetts abortion laws?

A Well, the thrust of that, I believe, at this point is to support the Supreme Court decision.

Q Prior to the Supreme Court decision you were fairly outspoken, were you not, in criticism of all state laws applying to abortion?

A I would like to qualify that to have it relate to the medical aspects. I think medical procedures should be medically regulated.

Q That is the basis for your opposition?

A Yes.

Q In most situations that have involved the dispute as to the desirability of State regulation or State involvement, isn't [133] it correct that you have opposed the State involvement?

A Well, I would have to understand what you really mean by involvement.

Q Let us take one recent case, the situation where a doctor at the Boston City Hospital was being prosecuted. You voiced your opposition of that prosecution as stemming from an abortion?

A Yes.

Q Are you aware of what the Government's case is going to be in that case?

A Not fully.

Q So you joined in opposition to this particular prosecution of a doctor without informing yourself of the other side?

A Well, I believe I am fairly well informed about it. My understanding of it has to do with the fact, as I see it, that the Supreme Court made a judgment about a situation and I saw nothing in what he did that was contrary to that judgment.

Q You don't know what the Government's case is going to be in that case?

A I can not specifically tell you the details.

Q It may well be based on eyewitness testimony and other testimony — that there is a case there?

A It is possible, but in my reading of it that was not what I saw.

[134] Q Your reading was based on the doctor's representations?

A And the newspaper reports and other reports that I have read, yes.

Q Isn't it atypical you would make a judgment without informing yourself of the other side's position?

A I have informed myself as completely as any citizen might.

Q You don't know what the Government's case is going to be?

A How would I know that?

MR. BEHAR: I have no further questions.

JUDGE FREEDMAN: Doctor, you stated earlier in cross-examination that by and large the minor's fears of being ostracized or condemned or criticized by the parents when the pregnancy was made known have not occurred.

THE WITNESS: Yes.

JUDGE FREEDMAN: I would like to ask about the minority of the cases in which the fears have been justified. What traumatic experiences have occurred in the family relationship as a result?

THE WITNESS: What we have seen is on occasion a teenager has been asked to leave home, has been refused parental support, has been beaten. There are a whole variety of situations in that range depending, really, on the family circumstances. But those situations [135] do occur. Occasionally, one parent will attempt to deal with it by handling the situation alone fearing the wrath of the other parent.

And we often see a mother come in with a teenager saying, "Don't let my husband know about it because he'll kill her."

JUDGE FREEDMAN: Have further psychiatric or psychological disturbances occurred in the patient as a result?

THE WITNESS: Yes. It is very difficult to follow up this kind of situation because the people only come at certain times in their lives to be seen and we can not follow somebody who does not come, but there are further complications and family splitting.

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CROSS-EXAMINATION BY MR. REYNOLDS

Q Good afternoon, Doctor. Doctor, I believe on direct examination several weeks ago you said a number of the young women come to Beth Israel and are referred through various agencies.

A Yes.

Q Are these agencies of the State Government?

A No.

Q What are the agencies that refer them to you?

A I can't answer that specifically at this point since I [136] no longer have the job that I had last year where I was familiar with the specific details of the agency. I am not current on it.

Q Do you know, Doctor, in the year 1974 the relative magnitude of the number of abortions performed on young women under the age of 18?

A At the Beth Israel?

Q Yes.

A I would have to give you a rough estimate because I do not have the exact figures available, but about 25% of the people we have seen were 18 and under.

Q Eighteen and under?

A Yes.

Q Would that make any difference as to those below 18?

A Well, the figures are broken down that way. That is roughly the way it stands. I can not tell you the number of abortions we did last year, but it was something like 800, between 600 and 800, and 25% of that figure would be 18 and under.

Q You also have maintained at the hospital a clinic for young ladies who make the decision that they would like to carry full term; is that so?

A Yes.

Q How many young ladies opted for that choice in 1974?

A I am not familiar with the figures in that clinic.

[137] Q Do you know what composition the people in that clinic are by way of age? Are they mostly under age 18?

A They all are by definition.

Q Is that a clinic to which they go on a twice a week basis or some regular basis?

A They go on a regular basis. I don't think it is as often as once or twice a week.

Q Who is in charge of that clinic?

A Dr. Perlmutter.

Q What is her first name?

A Johanna.

Q A female doctor?

A Yes.

Q As to those teenagers or young women under 18 that you had occasion to interview, what is their situation? Do most or all of them live at home?

A It is extremely variable. I would say probably most of them do, but not all.

Q Do most of them attend school, public school, below the point where you graduate from high school?

A A fair number are school dropouts, but probably most attend at some intervals anyway.

Q Do any of them work for a living?

A Some.

Q Can you help us with the percentage of those who do work [138] for a living?

A I couldn't give you the figures.

Q You said most of your experience was not related to the evaluation of teenagers who are pregnant. Is that what you said on direct examination?

A Yes.

Q Are you presently concerned with a program dealing with young people who are pregnant? Are you presently working on an abortion program for young women under the age of 18?

A I am presently involved in a project on that, but that is not my primary job presently. It was up until last year.

Q When last year did your job end?

A January 1st.

Q So it would be January 1st of 1973 or 1974?

A January 1st of 1974 was when I took this new position.

Q I take it that Beth Israel Hospital's position is that, so far as you know it, there has to be an informed consent made and it stands neutral as to whether or not the young woman carries to term or aborts, is that correct?

A Yes.

MR. REYNOLDS: Thank you.

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[139]RE-DIRECT EXAMINATION BY MR. LUCAS

Q Doctor, you testified concerning some of the problems that minors have whose fears are realized would be compli-

cated by the requirement of both parents' consent being required.

A Yes.

Q Do you think there would be more minors whose fears were realized under those circumstances?

A Yes.

Q Are there some minors who go to their parents anyhow even before discovering consent is required?

A Yes, there are.

Q Do you find there are some minors who do not need any counseling at all because of their understanding?

A I would say I would be hard put to find a time when that would be true.

Q Do you find a large percentage of the minors coming in have made up their mind whether to have an abortion or not?

A A large percentage have made up their minds. More adults have made up their minds than minors. Most of them are somewhat confused about what to do.

Q Do the minors find it difficult to choose between the alternatives of continuing the pregnancy and terminating the pregnancy? Is that a difficult question?

A It is a difficult decision. Some make it more [140] easily then others.

Q Did you testify that there are even at the present time no college programs that you know of in training abortion counselors?

A Yes, there are some counseling training programs, but not necessarily specifically abortion or pregnancy counseling. That has been done by other agencies.

Q Isn't it true that until recently even medical textbooks did not have a discussion of contraception in them?

A That is true.

Q Amongst counselors or abortion counseling people without any formal degrees in counseling?

A Well, it depends on where the counselor works. At the Beth Israel they are all social workers who have a degree in social work, which would involve training in counseling. There are people who do counseling, I believe, in other agencies who are trained by those agencies and who may not have a degree in counseling.

Q In obtaining a degree in social work, is a person, in the past at least or up until very recently, going to have any exposure to actual abortion counseling? Is that an essential element for the degree?

A Sometimes not.

Q Is extensive experience in abortion counseling an adequate substitute for formal training?

[141] A Yes.

Q Do you find there are differences of opinion among different physicians and psychiatrists about various aspects of the abortion procedure and the methods of counseling?

MR. REYNOLDS: I object to that question.

JUDGE ALDRICH: Is that different from the question you asked, Mr. Reynolds?

MR. REYNOLDS: I don't think I asked her that.

JUDGE ALDRICH: I don't think you did. Mr. Behar certainly did.

MR. REYNOLDS: My point of view is a little bit different from Mr. Behar's point of view. I submit that it is a duplicitious question.

MR. LUCAS: I will withdraw it and ask the question more clearly.

Q Do psychiatrists differ as to the desirability of group versus individual counseling?

A There is very little that has been written about group counseling in this particular situation. I think psychiatrists would agree that counseling is important and necessary.

Q Do you find that some psychiatrists feel that group counseling is better and others feel the other way?

A Yes, I would think so, but the literature is not very abundant in the area of group counseling. There are [142] post-abortion groups. That is different.

Q Would you say there are no current opinions formed as to which is most desirable, group counseling versus individual counseling?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Sustained.

Q Are there any firm opinions formed as to the desirability of group counseling versus individual counseling?

MR. REYNOLDS: Objection. She has answered that question.

JUDGE ALDRICH: If that is your only objection, then you may answer.

A There is very little familiarity that I have with group counseling. In this particular area people favor individual counseling, family counseling.

Q In the context of a group counseling situation, is it possible that the inclusion of adults may facilitate communication among the adults?

MR. BEHAR: I object.

JUDGE JULIAN: That seems to be leading.

Q Are there any circumstances under which it would be reasonable to include both adults and minors in the same group counseling situation?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

[143] JUDGE ALDRICH: If this witness has any opinion, she may give it.

A I think it could be very helpful.

MR. LUCAS: I have no further questions. I believe at the last hearing we did not have Dr. Nadelson's curriculum vita.

I apologize for having it so late. I only have two copies. May this be marked as an exhibit? I move it be admitted as her curriculum vita, detailing her experience and background.

JUDGE ALDRICH: It may be admitted.

(Plaintiff's Exhibit 9 in evidence.)

Q Is this a copy of your curriculum vita?

A Yes, it is.

MR. LUCAS: No further questions of this witness.

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RE-CROSS EXAMINATION BY MR. BEHAR

Q In the situation where you have stated that the minor's fears are realized, isn't it the case that this is extremely rare in your experience?

A No.

Q It is clearly a lot rarer than the situation where fears are not realized?

A Yes.

Q Are you familiar with standard obstetrics textbooks such as [144] Williams on Obstetrics?

A I haven't read it in quite a few years.

Q Don't the textbooks all contain ample descriptions of various contraceptive techniques?

A My edition was in 1957. It had nothing on that at all.

Q At some point in regard to counseling do you think that counselors should be subjected to instruction from someone who does have formal training, such as yourself?

A Formal training, yes. I think there are some variations about what requirement one would have about the qualifications.

Q For formal training?

A Of some kind, yes.

MR. BEHAR: No further questions.

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RE-CROSS EXAMINATION BY MR. REYNOLDS

Q Doctor, I see from this document you are married to Dr. Theodore Nadelson?

A Yes.

Q Is he also a physician?

A Yes.

Q And you have two children?

A Yes.

Q How old are your children?

A Six and eight.

[145] Q Are they boy and girl?

A Yes.

Q As a parent would you wish your child to come to you in the event she found herself to be pregnant?

A I would hope so.

MR. REYNOLDS: Thank you.

JUDGE FREEDMAN: Anything further of this witness?

MR. LUCAS: No further questions.

JUDGE ALDRICH: Do you have more witnesses, Mr. Lucas?

MR. LUCAS: We do have both Dr. Zupnick and Mr. Bill Baird. Their depositions have already been taken, which took approximately a day or a day and a half.

It is our felling that the depositions are an adequate predicate for introducing their evidence.

We would like to move, in lieu of having them testify and further drag out the hearing, that their depositions be accepted as their testimony.

JUDGE ALDRICH: Mr. Behar?

MR. BEHAR: As I indicated at a prior hearing, we would object to that. We think the Court ought to see the witnesses. As you know, discovery is often a wideranging process. These depositions were really just to get information more than anything else and lots of the answers [146] are irrelevant and we think would not be admissible in evidence, and we would object.

MR. REYNOLDS: I join in my brother's objection, if Your Honor please.

JUDGE ALDRICH: I just finished trying a patent case in which the witness' direct examination was put in through the deposition and he was then subjected to cross-examination.

Now, who took the depositions?

MR. BEHAR: We did.

JUDGE ALDRICH: Your position will be sustained. We will hear the witnesses.

MR. LUCAS: The plaintiffs call as their next witness the plaintiff, Dr. Gerald Zupnick.

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GERALD ZUPNICK (SWORN)
DIRECT EXAMINATION BY MR. LUCAS

Q Would you state your name and address?

A Gerald Zupnick, 79 Berkshire Road, Great Neck, New York, 11023.

Q Are you a plaintiff in this lawsuit?

A Yes, I am.

Q What is your current association with the Parents Aid Society?

A I am a contract physician with Parents Aid Society.

[147] Q What does that entail?

A That entails my performance of medical services for Parents Aid Society.

Q Are you associated with Parents Aid Society in New York and in Boston?

A Yes.

Q Are you an employee of Parents Aid Society?

A No, I am not.

Q Would you describe for the Court your background and education, starting with college and through your medical training.

A I received a B.A. degree from Columbia University in New York City in 1964. I received an M.D. degree from the University of Louisville School of Medicine in 1968. I did a straight surgical intership at Emory University Grady Memorial Hospital in Atlanta, Georgia from July, 1968 to June, 1969.

From July, 1969 to July, 1970, I was on the staff of the Emory University School of Medicine, Department of Gynecology and Obstetrics, Division of Family Planning.

Q Are you licensed to practice in the Commonwealth of Massachusetts?

A Yes.

Q Would you tell the Court what other states you are licensed to practice in?

[148] A Kentucky, Georgia, California, Florida, New York, Connecticut and Washington, D.C.

Q Would you describe what your experience has been during abortion procedures?

A I have performed approximately 5,000 first trimester abortions under local anesthesia.

Q At what facilities have you performed these procedures?

A I trained at Williams Services in Manhattan in May of 1972 to December of 1972, and I have been working with the Parents Aid Society since July 1, 1973.

Q Were you aware that around November 1st a law was to come into effect in Massachusets requiring the consent of both parents for abortion procedures for minors under the age of 18?

A Yes.

MR. REYNOLDS: Objection as to the characterization of the law.

JUDGE ALDRICH: We will pay no attention to the characterization. Go ahead.

THE WITNESS: Yes.

Q Were you concerned that this law might be enforced against you in any way?

A Yes.

Q Were you fearful of the possibility of any prosecution?

A Yes, I was.

[149] Q Did anyone ever specifically threaten you with prosecution?

A No.

Q If the law had gone into effect, would you have continued to perform abortion procedures on minors?

A No.

Q Would you have totally stopped doing abortion procedures in Massachusetts if the law had gone into effect?

A No. On minors, I would have.

Q To what extent are you involved in counseling at Parents Aid Society?

A To a minimal extent. I have sat in on various counselors and have listened to their counseling from a medical standpoint. I occasionally get involved with counseling if there seems to be a specific problem with the patient.

Q Do you have control over the medical policy at Parents Aid Society?

A Yes, I do. I am medical director of Parents Aid Society.

Q Do you have control over the counseling policy?

A From a medical standpoint, yes, I do.

Q Have you reviewed the counseling policy from time to time?

A Yes, I have.

Q Approximately how many minor patients have been patients of yours at Parents Aid Society in Boston?

[150] A It is hard to give a specific number. An approximate percentage, I would say, would be about 30% of the patients.

Q What procedure is utilized with these patients to obtain an informed consent?

A Well, as with any patient, the procedure is explained to them, the inherent risks are explained, and it is ascertained whether they understand the procedure and the inherent risks.

Q Are the options between continuing pregnancy and abortion discussed with these minors?

A Most certainly.

Q About how long is the counseling session?

A About two hours.

Q Is this normally conducted by you or some other person?

A Normally, not by myself.

Q Who are the individuals that do most of the counseling?

A In the Boston Parents Aid Society it would be either Mr. Bill Baird or Marilyn Morrissey, an R.N., a registered nurse.

Q Do you then see the patients after they have been counseled?

A Yes, I do. And in terms of counseling, I go through the procedure specifically with each patient prior to the procedure to make sure they understand what is going to happen.

Q Do you describe the procedure to the patient in each step?

[151] A Yes, I do, prior to performing each step.

Q Up to how many weeks are abortions performed at Parents Aid Society?

A Twelve weeks gestation.

Q Are you the only physician who performs abortions there?

A Yes, in Massachusetts.

Q If the patient has any difficulty during counseling, do you ever counsel the patient extensively yourself?

A Yes. I have had occasion to do so, although it is not common.

Q Would the patients in general — do they come through counseling understanding the procedure?

A Yes, they do. I might point out that if they do not, the procedure is not performed until it is felt that the patient does understand the counseling.

Q Are any patients ever turned away?

A Yes.

Q Under what circumstances are they turned away?

A Well, there might be a specific medical problem that is a contra-indication to performing the procedure or perhaps a problem with the patient's anxiety being too great a level to perform the procedure.

Q Are there any medical reasons you know of for denying an abortion to a patient under the age of 18?

A Yes.

[152] Q A medical reason for denying it?

A Are you asking me are there medical reasons for turning a patient away who is under 12 weeks gestation?

Q I left out a clause in my phrasing. Are there any medical reasons for denying abortions to all patients under 18 who can not get parental consent?

A Yes, such as an orthopedic deformity that would not allow the patient to be placed on the gynecological table in the proper position, or severe asthma, severe epilepsy. There are other medical reasons. These are rare.

Q Is it your practice to perform abortions for patients who request them unless there are these contra-indications?

A That is correct.

Q Do you understand this to be consistent with acceptable national standards?

A Yes, I do.

Q Which organizations promulgated those standards?

A The American College of Obstetricians and Gynecologists have promulgated such a position.

Q Is this position consistent with the American Medical Association's standards?

A Yes, it is also consistent with the American Medical Association's standards.

Q Do you understand it to be consistent with the Supreme Court's position?

[153] A Yes, I do.

MR. BEHAR: Objection.

JUDGE ALDRICH: We will take it merely as to his good faith understanding.

Q Does unwanted prengnancy pose any medical problems for minors under age 18?

A I'm sorry. Would you repeat that?

Q Does unwanted pregnancy pose any medical problems for persons under age 18?

MR. BEHAR: Objection.

JUDGE ALDRICH: Does the fact that it is unwanted make it a special medical problem? Is that what you mean?

MR. LUCAS: Perhaps I should eliminate the term "unwanted".

Q Does pregnancy under age 18 pose any special medical problems to those individuals as opposed to older persons?

A Not as opposed to older persons, no.

Q Does going through pregnancy — is that more serious for a person under the age of 18 than it is for a person who older?

A There are sometimes — statistically, there are more complications for a minor to go through a pregnancy, although I would not say these are really significant.

Q Have you ever discussed with minor patients their feelings [154] on the difficulty of obtaining parental consent?

A Yes.

Q What are some of the reasons patients give for being unable to or unwilling to get parental consent?

A The most common reason is fear of parental repercussion.

JUDGE ALDRICH: Parental what?

THE WITNESS: Fear of repercussion that would follow from informing their parents.

Q What are some of the other fears that minors under the age of 18 have in connection with contacting their parents? What types of repercussions?

A Sometimes physical and sometimes fear of literally being not allowed to live in the home any longer, and often simply being afraid to tell their parents.

Q Do you ever encourage minors to discuss their pregnancy with their parents?

A Yes. All patients are encouraged to discuss the abortion decision or pregnancy with anybody whom they wish to confide in.

MR. REYNOLDS: I object to that answer as not being responsive.

JUDGE ALDRICH: Well, it may stand.

Q I think the question is whether you ever refer patients to discuss the problem of pregnancy with their parents.

[155] A My answer would be yes.

Q Are there ever affirmative reasons for the parents' sake why the parents should not be told?

MR. BEHAR: Objection.

JUDGE ALDRICH: What is your objection?

MR. BEHAR: He has just given what the minor has told him. We do not have the parents in this picture at all.

JUDGE ALDRICH: So you object to his qualifications to deduce from his talking with the minors what might be the parental situation at home?

MR. BEHAR: That is right.

JUDGE ALDRICH: All right. Sustained. But if you were going to question the witness' good faith, he may answer that question.

MR. BEHAR: I don't understand. Good faith as to what?

JUDGE ALDRICH: As to his conduct. I believe you do not approve of his conduct. Am I wrong?

MR. BEHAR: I don't approve of the way certain things are done.

JUDGE ALDRICH: I deduced that. If I am wrong, that is that.

MR. BEHAR: No, you are correct.

JUDGE ALDRICH: All right. Then the witness [156] may answer on the issue of good faith.

THE WITNESS: Can the question be repeated?

MR. LUCAS: Would you read the question?

(The question is read.)

THE WITNESS: There are reasons why parents should not be told. You are asking me whether there are reasons for the parents' sake.

Q Do you sometimes discuss with patients the impact of the pregnancy on their parents, if their parents knew about it?

A Yes.

Q Do you encounter instances where there would be an adverse impact on the parents?

A In the opinion of the patient, yes.

Q What are some of the types of situations you have encountered in discussing the impact on the parents?

A That the parents' faith in the patient would be destroyed. It is difficult for me to differentiate between your phrasing "for the parents' sake" and "for the patients' sake". They are often one and the same as presented to me. I don't know if I am answering your question.

Q By witholding consent for the sake of the parents, what I mean is in the interest of protecting the parents from adverse consequences as opposed to the minors' interests. Do the minors ever want to withhold consent out of [157] thoughtfulness towards their parents?

A Yes.

Q Are there instances in dealing with minors where you feel that informing the parents would be disruptive of the family?

A Absolutely.

Q In what way do you think the family would be disrupted in these instances?

A As I mentioned before, there are times when the patient feels she would literally be thrown out of her home or that there are physical threats that she would undergo if her parents knew, and psychological damage to her parents in the patient's opinion.

Q Can you think of any rational reason for requiring the consent of both parents?

MR. REYNOLDS: Objection. It is far too broad.

JUDGE ALDRICH: He may answer.

A No.

Q Can you think of any rational psychological reason for requiring the consent of both parents for all minors under the age of 18?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

A No.

JUDGE ALDRICH: The answer may stand.

[158] Q Do you understand the law that was to go into effect in November would give either parent a veto over whether the minor had an abortion?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I didn't understand a word of that question.

Q Do you understand that the law that was to go into effect on November 1st as giving either parent an absolute veto over whether the minor obtains an abortion?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q Is group or individual counseling done at Parents Aid Society?

A Usually group.

Q Are there instances when adults are in the counseling procedure with minors?

A Are you talking about in the procedure or in counseling?

Q In the counseling itself.

A Yes, there are.

Q What is the reason for having both adults and minors together during group couseling?

A I don't see what the reason is for why not.

Q Could you explain what the reasons are for it?

A People are people. I don't see where age enters into this.

[159] Q Are the minors ever embarrassed by being in a counseling session with adults?

A It might occur. It is not common to my knowledge.

Q Can you think of any reason why minors and adults should not be in counseling together?

A No.

Q Have you had complication in treating abortion patients at Parents Aid Society?

A No major complication, no.

Q Have there been any hospitalizations that you know of?

A No.

Q What do you do about the possibility of needing to admit patients for emergency treatment after the procedure?

A If it were necessary, we would simply take the patient to an emergency room of a good hospital, and if it were a bona fide emergency, I am sure they would be admitted.

Q You mentioned that sometimes patients are turned away. At what point in the process of going through the abortion center are the patients turned away?

A It could be at any point. It could be right up to the time I am explaining things to the patient in the treatment room.

Q At what point is the patient finally and irrevocably accepted as a patient you are going to do the abortion on?

A When she is in the treatment room and I feel there [160] is no contra-indication to the procedure.

Q Are the patients finally accepted just on the basis of their original phone call?

A No.

Q Have you ever encountered instances where parents were trying to coerce a minor into having an abortion?

JUDGE ALDRICH: I think this would be a good place to suspend. We will resume the testimony tomorrow morning at 9:30. In the meantime, we will see counsel in the lobby with respect to a motion that has been filed.

(Whereupon the hearing was recessed
to Tuesday, December 31, 1974,
at 9:30 A.M.)

• • • • •

DECEMBER 31, 1974.

[2] MR. LUCAS: The plaintiffs are prepared to resume with the testimony of Dr. Zupnick.

JUDGE ALDRICH: First off, I will make a short comment. I read the transcript last night. There are a couple of very minor corrections. There may be more, but these are the two that I noted.

On Page 5, line 18, the word "now" should be "not". On Page 52, line 11, it presently reads "rising percentage" followed by a dot and that should read "rising percentage," and then "period" and then a dot.

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GERALD ZUPNICK (Resumed)
DIRECT EXAMINATION BY MR. LUCAS (Continued)

Q For the record, would you state your name again and your association with Parents Aid Society?

A Gerald Zupnick, medical director, Parents Aid Society.

Q Does Parents Aid Society receive patient referrals from other clinics in the city and in the area?

A Yes, to my knowledge.

Q What are the facilities that make such referrals?

A Pre-Term sends us patients and Charles Circle Clinic.

Q Do you know the reason why some of these patients were sent? A What I have been told usually is that these have been minors who do not have parental consent or patients who [3] do not have the usual fee for the procedure.

Q As far as you know, have any other abortion centers or clinics been treating minors without consent prior to the restraining order in this case?

A In the State of Massachusetts?

Q Yes.

A Not as far as I know.

Q Are any other medical procedures performed at Parents Aid Society?

A Yes, the standard gynecological office procedure is performed. There is contraceptive advice. There is the insertion of I.U.D.'s, prescribing oral contraceptives, veneral disease diagnosis, the usual gynecological procedures.

Q Are there any surgical procedures involving cutting done there?

A No.

Q Would you characterize a first trimester aspiration abortion as surgical or medical or does it make any difference?

A It is a matter of semantics. I have heard it called both.

Q Have you had occasion to evaluate the counseling by paramedical personnel in your experience doing abortions?

A Yes.

Q Are you satisfied with the counseling that is done at Parents [4] Aid Society when the patients are presented to you?

A Yes. I think it is excellent in comparison to what I have seen.

Q What have you seen at other facilities?

A I have seen individual and group counseling. I have seen a full range of quality counseling.

Q Have you found any particular credentials were necessary to qualify a person for doing good counseling?

A No. I think good on-the-job training can properly prepare a person for counseling.

Q Why do you not think that particular credentials are important?

A I just don't feel it is necessary for this procedure. I think you could train a person adequately to counsel for an abortion without going through formal university training, which is what I assume you are referring to.

Q Yes. Did you bring with you any of the sample forms for Parents Aid Society?

A No.

Q Who takes the patient's history at Parents Aid Society?

A It can be any one of several people from the receptionist to a nurse to a volunteer who might be there that day, but it is usually trained para-medical personnel.

Q Do you check the patient's history yourself?

A Yes, I do.

[5] Q What do you look for on the history form?

A What I am particularly interested in is any contra-indications in performing the first trimester abortion.

Q How do you determine if the patient is pregnant and how far along she is?

A Well, the pregnancy test on the patient is first done. When the patient comes in to see me, I examine her in the usual bi-manual procedure, which is the accepted procedure for determining size of pregnancy.

Q Have you in your experience ever encountered any minor patients whom you did not think were capable of giving an informed consent?

A No, not incapable of giving informed consent.

Q Do you think that any are screened out before they get to you?

A It is possible. It is hard to know who is screened out before they get to me.

Q Under what circumstances would you think a minor under 18 was not capable of giving informed consent?

A Some form of mental retardation perhaps.

Q Are there many other circumstances that would disqualify them from giving an informed consent?

A For some reason like inability to understand the consent form, but that is very rare. I personally haven't encountered it.

[6] Q What is your understanding of what constitutes an informed consent?

A It is informing the patient of what the procedure is that they are about to go through and its possible complications and ramifications.

Q I believe you testified that there are some patients who do not want to tell their parents, and that is, of course, what this lawsuit is about. What reasons are sufficient to you from a patient for not wanting to advise their parents?

A Any reason. I think any patient is entitled to his or her privacy.

Q Do you cross-examine the patient to try to ascertain the underlying basis for not informing their parents, for not wanting to tell them?

A I wouldn't say that I cross-examine in a courtroom sense, but I will sometimes ask. As I believe I have stated before, we always try to encourage a patient to be as open as possible about the abortion decision with anybody whom they wish to confide in, but it is not forced upon them.

Q Do you also have patients who are over the age of 18 at Parents Aid Society?

A That is correct.

Q Do they ever not want to inform their parents or their children about their going through an abortion?

MR. REYNOLDS: Objection. That is not part [7] of this case.

JUDGE ALDRICH: Excluded.

Q Does Parents Aid Society have any license from the State Department of Health to operate a facility?

A Not to my knowledge.

Q Do you understand that such a license is legally required?

A Not to my knowledge.

Q Do you personally feel that you are complying with the guidelines of the United States Supreme Court decision in operating this facility?

MR. BEHAR: Objection.

MR. LUCAS: This goes to intent.

JUDGE ALDRICH: On the matter of good faith only.

Q You may answer.

A Yes, I believe I am.

Q What type of psychological reactions do the patients have after the procedure?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: What is the objection?

MR. REYNOLDS: I don't know that the doctor is qualified to discuss psychology.

JUDGE ALDRICH: Well, we haven't any evidence to base his opinion on, apart from his qualifications as a medical doctor, so you had better ask some more [8] questions.

Q Can you describe the patient's reactions after the abortion procedure?

MR. REYNOLDS: Objection. We ought to establish if he sees the patient after.

JUDGE ALDRICH: I think so, too.

Q Do you see the patient after the procedure?

A Yes, I do.

Q Are you in the room immediately after the completion of the procedure?

A Yes, I am.

Q To what extent do you see the patient thereafter and before they leave?

A I usually see the patient again in the recovery room on one or two occasions to see how they are doing, and the patients are usually checked by me before they leave to make sure that everything is okay.

Q Do you talk to them immediately after the procedure?

A Yes, I do.

Q Would you describe what their reactions are when you talk to them after the procedure?

A Most often it is relief at the completion of the procedure and surprise as to the simplicity of the procedure.

Q Do you ever encounter reactions of guilt or hostility after the procedure?

[9] A Occasionally, but it is very rare.

Q What percentage of patients does Parent Aid Society follow up as far as you know?

A Well, this a guess. It is about 70 —

MR. REYNOLDS: Objection to the guess.

JUDGE ALDRICH: Sustained.

Q Could you give an approximation from your experience?

A Yes.

Q What would the range be?

A I would say about 75%.

Q What type of follow-up is provided for the patients?

A Well, when a patient is counseled for the procedure they are asked to think about a form of birth control to use. So afterwards, we try to provide that form of birth control to make sure everything is all right post-abortal.

MR. REYNOLDS: I don't think this case is concerned with birth control.

JUDGE ALDRICH: I would be happy to have this stipulated all around.

MR. LUCAS: I would agree with that.

Q May I ask you about the follow-up with regard to possible complications from the abortion procedure. What type of short and long-range follow-up is provided for the patients?

A Well, most complications usually fall into the category of what you are describing as short-range. The patients [10] are checked afterwards simply to make sure everything is medically okay post-abortal.

Q What does a patient do if she has some type of fever or other complication the day after the procedure or two days after the procedure?

A The patient is given an instruction sheet by Parents Aid Society which lets the patient know how to contact us on a 24 hour basis and we are available for any patient on a 24 hour basis.

Q How many days a week do you normally spend in Boston?

A Two.

Q Who handles the patients when you are not here if they need any follow-up?

A Usually Dr. Inker or any one of a number of several cooperating physicians who the clinic feels is good. But I should state that this has been necessary in my experience since we have been in Boston only one time, and it was primarily necessary for reassurance in an anxious patient. Most complications are handled telephonically. It is usually a matter of reassurance of the patient.

Q Have you had any instance of patients being hospitalized after the abortion procedure that you know of?

A None.

Q Do you find it more difficult or easier to perform abortions physically on minor patients under 18?

[11] A Physically?

Q Yes.

A It is.

Q Just in general, not just physically?

A Well, if I were to break it down, I would say that in a younger patient, who is generally nulliparous, who has not been pregnant before, that is, it is slightly more difficult to dilate the cervix. I would say not say significantly so. However, psychologically I would say it is a lot easier usually to

perform the procedure because most younger patients do not have the usual stigmata of illegal abortion in thier heads.

MR. BEHAR: Objection.

JUDGE ALDRICH: Overruled.

THE WITNESS: Most younger patients just never had to deal with the problem of obtaining a criminal abortion.

MR. REYNOLDS: I object to that.

JUDGE ALDRICH: I think the original answer answered the question.

MR. LUCAS: We would like to put into evidence a set of standard forms used at the clinic.

(Standard forms used at Parents Aid Society marked Plaintiffs' Exhibit 10 for identification.)

Q Would you state for the record what this set of forms [12] consists of?

A Well, the first sheet here is the confidential information form, which has the patient's name, address and telephone number, which to my understanding are filed separately from the medical part of the chart.

The next page I have is the history and surgical record, on top of which is a very brief history and is essentially the surgical record which I fill out of the procedure.

The next page is the patient's questionnaire, which is essentially the basis of the patient's history.

The following page is the informed consent to the procedure. This is for the patient to read over and to sign authorizing Parents Aid Society to perform the procedure.

The next page is the instruction sheet to which I previously referred that every patient is given.

Q Are all of these forms provided to each patient at Parents Aid Society?

A Yes, to my knowledge they are.

Q Are these the same forms used at Parents Aid Society in New York also?

A Yes.

MR. LUCAS: We would like to move that these be admitted in evidence as the standard forms [13] utilized at Parents Aid Society.

MR. REYNOLDS: No objection.

MR. BEHAR: No objection.

THE CLERK: Plaintiffs' Exhibit 10.

(Plaintiffs' Exhibit 10 for Identification received in evidence.)

MR. LUCAS: We have no further questions of this witness.

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CROSS-EXAMINATION BY MR. BEHAR

Q I believe you stated that you are a contract physician?

A That is correct.

Q Is this an oral contract or a written contract?

A Oral.

Q With whom did you contract?

A Mr. Bill Baird.

Q Did you understand he had authority to enter into this contract?

A Yes, I did.

Q In what capacity did he have this authority as you understood it?

A As clinical director of Parents Aid Society.

Q What are the terms of the oral contract that you have?

A Simply that I am to provide medical services for the Parents Aid Society for which I obtain a fee per patient.

[14] Q Has this fee been set in advance?

A It varies with the patient. It varies with the amount the patient pays.

Q Do you receive a salary from Parents Aid Society?

A No.

Q Could you tell the Court how you are reimbursed?

MR. LUCAS: We object to any extensive inquiry into the administrative and financial aspects of Parents Aid Society because this is the other lawsuit Mr. Behar keeps trying to try here.

JUDGE ALDRICH: We are interested in the doctor's standing. To the extent the inquiry is related to that, it seems to me to be quite relevant. How far he will be allowed to go into it is another question.

Q Would you answer the question?

A Would you repeat the question, please?

Q Would you explain to the Court how you are reimbursed?

A I receive a fee per patient.

Q In the situation of an abortion how is the fee determined?

A It is usually one-third of the fee that the patient pays, but not always because there are some patients who pay a lesser amount and some patients are free, and I don't get anything for these patients.

Q Do you receive fees for anything else besides abortions?

A When I provide other services, such as birth control [15] work.

Q Are those fees a percentage of the patient's charge?

A Yes, they are.

Q Could you indicate what the various charges are for the services of Parents Aid Society?

A Are we going into birth control now?

Q For the various medical services performed there under your directions.

JUDGE ALDRICH: I think we will stick to abortion.

Q Is there a maximum price for an abortion at Parents Aid Society?

A Yes. The abortion fee is on a sliding scale from the patient's ability to pay to a maximum of $150.

Q In the case where $150 is charged, what do you receive in that instance?

A Usually a third.

JUDGE FREEDMAN: Is that paid on a monthly basis?

THE WITNESS: No. It is paid on a daily basis. I am given a check at the end of the day.

Q What was the amount of the last check that you received from Parents Aid Society?

MR. LUCAS: Objection.

JUDGE ALDRICH: Why does it make any [16] difference how many he performs?

MR. BEHAR: I am not asking him how many. I am trying to get an idea of the financial benefits this plaintiff derives.

JUDGE ALDRICH: He told us that. In what way do you embroider what he already said?

MR. BEHAR: It is pertinent to the situation of the minors in this case having similar representation as these plaintiffs. We think there is a conflict of interest type situation that is inherent.

JUDGE ALDRICH: You have established enough of that already without any dollar sign for the argument. You may go ahead.

A I honestly don't recall the exact figure. I believe it was in the area of $600.

Q You have received checks higher than that amount?

A Higher and lower, yes.

Q Does that constitute reimbursement for two days work?

A That is correct.

Q Do you perform —

JUDGE FREEDMAN: Is that for all services or strictly those relating to abortion services?

THE WITNESS: All services. But I should stipulate that I am primarily performing abortion services.

Q As a matter of fact, you do not perform any of the [17] contraceptive services any more, do you?

A On occasion I do. That is not my usual function.

Q That is the rare situation then?

A I wouldn't say rare, but it is not my usual situation.

Q Isn't it a fact that you hired a new physician just to perform the contraceptive services provided at Parents Aid Society?

A That is correct.

Q That was done to free you so you could devote your time to abortions, wasn't it?

A That is primarily correct.

JUDGE FREEDMAN: I would be interested, Doctor, in the number of abortions you performed — the percentage of those that incorporate fees of the maximum $150 as opposed to those that are actually free.

THE WITNESS: As I said before, it is not always free or $150. It is on a sliding scale basis. If you are asking me how many patients pay the total of $150 fee —

JUDGE FREEDMAN: Yes. How many pay no fee on a percentage basis?

THE WITNESS: I would say probably about two-thirds pay the $150 fee and probably about 15% are done for free, and then there is a scale in between on the other patients. I should state that these fees and these determinations are not

made by me. They are made [18] primarily by Parents Aid Society, and I am simply relying upon their integrity in my reimbursement.

Q Are you aware, Doctor, of any legal requirement in the Commonwealth that requires a physician to participate in the fee that is charged a patient for services?

A Not to my knowledge.

Q You indicated that you have encountered situations where there were reasons for not informing parents on the part of minors; is that correct?

A Where minors do not want to inform their parents, yes.

Q You said that in these situations there would be disruption of the family if parents were informed. Is that what you testified to?

A I believe I testified that there could be.

Q This was based solely on the representations to you by the minor; is that correct?

A I have to rely solely upon what any patient tells me.

Q You did not talk with the parents? You did not make any effort to contact the parents?

A No.

Q Your testimony then as to disruption of the family is based solely on the representations of the minors to you?

A The way I accept most patient's histories or questions.

Q And if the minor was not telling the truth, then the reasons for your testimony would not exist; is that right?

[19] A Maybe, maybe not. There might be reasons that are not given. I don't know. The doctor has to accept any patient's history on the basis of what he feels that patient is telling him.

Q Do you always feel that your patients are telling you the truth?

A Not always, no, but essentially my training is to ferret out what I think is the truth.

Q Sometimes do you have the feeling that a patient is telling you what you want to hear?

A No I don't think so. I don't see what the reason for a patient to do that would be.

Q Well, in the referral situation that you mentioned you indicated that one of the reasons for referrals was that it was a parental consent requirement at various other clinics.

A Correct.

Q Wouldn't a reason that might be offered to you by a minor that they know you are going to let them have the abortion without parental consent?

A No question. We do not require parental consent under any circumstances. Why should the patient lie to me?

Q A minor can come in for any reason and not inform the parents?

A That is correct.

Q Have no reason at all, just say, "I want an abortion", and [20] not give a reason?

A You are asking if a patient can request an abortion from me for any reason whatsoever? Is that your question?

Q Yes.

A The answer is yes.

Q You make no effort to follow up on the parents in this situation?

A I do not attempt to call the patient's parents, no, no more that I would attempt to call the parents of a 40 year old patient.

Q Did you continue your formal education beyond 1970?

A Not beyond 1970.

Q Are you certified by any board?

A No, I am not.

Q Are you affiliated with any hospital in Massachusetts?

A No, I am not.

Q What about New York?

A No.

Q No hospital affiliation?

A No.

Q Are you the only medical director Parents Aid Society has ever had in Boston?

A In Boston, yes, to my knowledge.

Q When did you first assume your duties as medical director?

A In October, 1973.

[21] Q Do you hire the counselors or the paramedics at Parents Aid Society?

A No, I don't do any hiring.

Q Do you know who does?

A I am not sure who does the final hiring, no.

Q What are your duties generally as medical director, as you see them?

A To make sure that the medical procedures in the center are done correctly and that patients are being informed correctly and that everything medically is up to par.

Q That is the counseling too?

A Yes.

Q But you don't hire the counselors?

A No, I don't.

Q Do you participate in the decision to hire them?

A I have occasionally been asked for my advice, yes.

Q Who made the decision to utilize the group counseling method?

A I don't know.

Q Did you?

A No.

Q Was this in existence before you got there as medical director?

A Yes.

Q Were abortions being performed at Parents Aid Society before you became medical director?

[22] A To my knowledge, yes.

Q Do you know the doctor or doctors who were doing that?

A I know two of them, yes.

Q Isn't it a fact, Doctor, that the group counseling session is really a convenience to your schedule? Isn't that why it was instituted?

A No.

Q Well, you only spend two days here in Boston; is that right?

A That is correct.

Q If counseling was to be done individually, it would require far more extensive time, wouldn't it?

A More extensive time or more people being involved doing the counseling.

Q So in a sense this group counseling method is ideal for your particular travel schedule, isn't it?

A Not necessarily.

Q Well, as I understand it, you have patients come in in groups, right?

A That is correct.

Q How large are these groups?

A Usually from one to eight patients, but I would say on an average of four to five.

Q They could go higher than eight and as many as ten?

A That would be unusual, but it has occurred, yes.

Q And then immediately following the counseling do the [23] patients then see you?

A Yes.

Q And if the patients have to come in one at a time for a two hour session, it would be very difficult for that all to take place in one day?

A I only see one patient at a time. They could be scheduled in whatever manner. They are available for me to see one at a time. That is all I see.

Q Who made the determination to have the counseling and the operation take place on the same day?

A I don't know. This was already in existence.

Q Did you have any medical reservation about that?

A No.

Q Is there any attempt made to limit the group to, say, solely minors or solely adults?

A Not to my knowledge, no.

Q Do you think it good medical practice to do that?

A To do what?

Q To limit the groups to just minors, on the one hand, and adults, on the other hand.

A Not necessarily, no.

Q The groups that you are talking about range in a variety of ages; is that right?

A Yes.

Q No attempt is made to treat minors uniquely or adults [24] uniquely; is that right?

A Well, are you asking me — would you clarify that question?

Q You do not set up your group counseling sessions to address solely minors, on the one hand, and adults, on the other hand, do you?

A No.

Q Do you discuss with the minor the reasons for refusal to inform their parents of her situation?

A I believe this is taken up with the patient.

Q Do you personally do it?

A Occasionally.

Q Is there any particular reason why you might do it in some instances and not in others?

A No. It is usually my medical judgment.

Q Do you ever tell the minor, "I think it would be a good idea for you to inform your parents"?

A Yes, I have told that to minors.

Q Do you actively encourage parental involvement?

A As I stated before, we encourage any involvement with whom any patient would wish to confide. We feel that support in this kind of decision is beneficial.

Q You do not press it?

A No, it is not pressed.

Q If the patient gives a reason that she doesn't want to in-
[25] form her parents, it is left at that?

A Well, the reason might be gone into, but a patient's right to privacy is respected.

Q This right to privacy, is this a legal opinion you have been given?

A A legal opinion?

Q Yes.

A This is my feeling.

Q It is your own personal feeling?

A That is correct.

Q Well, can you estimate the percentage of patients that are minors who receive abortions at Parents Aid Society? Are you able to do that?

A I would say about 30% .

Q Can you give any estimate to the Court as to how many have not informed their parents?

A It would be guessing at best because I don't know, but I would say half and half.

Q Half and half. Does Parents Aid Society have a reputation as being a place where no questions will be asked about parental involvement?

A Questions are asked.

Q Does Parents Aid Society try to cultivate the reputation that if a minor comes in and does not want to inform her parents she is not going to be given any hassle?

[26] A Yes.

Q You, yourself, do not typically counsel the groups, do you?

A No.

Q This is left up to whom?

A Usually Mr. Baird or Marilyn Morrissey.

Q Did you hire either of those individuals?

A No.

Q Do you have the authority to fire either of those individuals if you were dissatisfied with their work?

A No, I don't.

Q After the counseling sessions are the surgical procedures then performed?

A Yes. Blood work or lab work might be done before or after the counseling, but usually after the counseling procedure is performed.

Q Could you describe to the Court exactly what the procedure is medically for the first trimester abortion?

A Certainly. The patient is already in the room when I come into the treatment room with a nurse. I talk to the patient and go over her medical history with her, and go over the procedure with her, and try to ascertain her anxiety level. If I feel she has to be calmed down, I will attempt to calm her down.

The patient is then placed into the dorsal lithotomy position.

[27] Q Would you tell the Court what that position is?

A The patient's legs are placed onto knee rests where they drape over the patient's legs so the exposure of the vagina can be accomplished. The perineal is prepped with Betadine solution, a surgical soap, and a speculum is inserted into the patient's vagina.

Q What does that look like?

A A speculum is generally described as a duck bill shaped double shoehorn. It is to provide exposure to the vagina. It opens the labia to the vagina. The vagina is then prepped with the same Betadine solution and anesthesia is then injected into the antero lip of the patient's cervix where the tenaculum is going to be placed so the patient doesn't feel the pinch of the tenaculum.

Q That being what?

A That is an instrument to grasp the cervix. The remaining anesthesia is then injected into the patient's cervical and paracervical areas. The patient's uterus is then sounded, which means the depth of the uterus is determined.

The amount of dilation is determined. Dilation is accomplished with Pratt dilators. After the dilation, the vacuum tip is attached to the aspiration machine.

Q What does that look like, this machine?

A It is a stainless steel piece of equipment rectangular [28] in shape and approximately three feet high and two feet wide and a foot and a half in depth with two collection bottles at the top of the machine to accomplish the vacuum aspiration.

The vacuum tip is then inserted into the patient's uterus and the vacuuming is accomplished.

After I feel that the products of conception have been removed, the uterus is curetted to ascertain whether all the tissue has been removed, and if I feel all the tissue has been removed, then I will aspirate for approximately another 15 seconds just to make sure there is no other debris remaining. That is essentially the procedure.

Of course, before each step, the patient is told what is going to happen and what she is going to feel, and whether she is ready for the next step.

Q When the patient walks into the operating room, typically that is the first time she has met you?

A Usually, yes.

JUDGE FREEDMAN: How long does the typical abortion procedure last?

THE WITNESS: The average technical part of the procedure is five to seven minutes.

Q When the patients come in, do they frequently have questions they ask you?

A The patients occasionally have questions, yes.

[29]Q What kind of questions do they ask?

A The most common one is, "How much does this really hurt?" Most commonly the questions pertain to anxiety about the specific procedure.

Q Is this a particularly anxious moment for the patients?

A I would say it is an anxious moment.

Q And it is clearly an anxious moment for them before the counseling, isn't it?

A Yes. I would say before counseling the anxiety level is a lot higher.

Q But there is some that remains in the patients even after the counseling and when they are with you in the operating room?

A Yes, as with any medical procedure.

Q Do you ever have to go over things with the patient that have already been explained to her?

A Occasionally, yes.

Q This is after the counseling session. There are still questions as to what is going to happen to the patient?

A Well, the questions usually are not what is going to happen because this has been explained to them, but usually pertain to the amount of pain involved. This seems to be the patient's most common anxiety.

Q Do you have Exhibit 10 in front of you, Doctor, the forms?

A The forms, yes.

[30] Q With reference to the consent form, did you write it?

A No, I did not.

Q Do you know who did?

A No, I don't.

Q How did it come to be used?

A It was in use when I came to the Parents Aid Society.

Q Did you approve it when you assumed your duties?

A Yes, it seemed in order to me. I am not a lawyer.

Q Did you ask that a lawyer look it over?

A It was my understanding that a lawyer had helped draft this.

Q Is there any reason why Parents Aid Society is not mentioned on this form?

A Not to my knowledge.

Q To your knowledge, there is no reason why?

A Not to my knowledge, no.

Q Do you understand that when you perform a first trimester abortion upon a minor without the parents' consent you are civilly liable to that minor?

A I don't understand what civil liability means.

Q In a tort suit for, say, battery upon the minor, civilly liable to that minor.

MR. LUCAS: I object. There is no basis for drawing that conclusion. It is a legal opinion.

JUDGE ALDRICH: I think the question is [31] reasonable enough. Why not explain it in lay terms?

MR. BEHAR: Well, I will rephrase it.

Q When you perform an abortion upon a minor without parental consent, do you have any understanding as to whether you are subject to a suit by that minor, a lawsuit?

A Anybody could sue me.

Q But for the reason that you are doing the procedure without parental consent. That is what I mean.

A Specifically because I am doing the procedure?

Q Yes.

A No.

Q You do not have that understanding?

A No.

Q Do you have the understanding that the parents of the minor could sue you for the sole reason that you performed the abortion without parental consent?

A I am sure they could sue me.

Q Even if you do the procedure well?

A Sure. They can sue me. Anybody can.

Q You run that risk every time?

A Yes.

Q You deliberately have decided to run that risk?

JUDGE ALDRICH: I don't think, counsel, that you and the witness are meeting on the same track.

MR. BEHAR: I thought we had reached an [32] understanding.

JUDGE ALDRICH: You did and then you got away from it.

Q Do you understand that a parent can sue you civilly merely because you performed an abortion upon their daughter without their consent?

MR. LUCAS: Objection, on just one point. Perhaps the question should distinguish between suing and recovering.

JUDGE ALDRICH: It certainly should. I thought counsel had grasped the point once.

MR. BEHAR: Between suing and recovering?

JUDGE ALDRICH: The witness made it very clear that anybody could sue him for anything. You haven't got him outside of that area.

Q Do you understand that a parent could sue you and recover civil damages, money damages, merely because you

have performed the operation upon their daughter without their consent?

A I don't believe they would recover anything.

Q You don't believe they would recover anything?

A No. I don't think I am doing anything wrong.

Q Has a minor ever given a reason for not informing her parents that you found unacceptable?

JUDGE ALDRICH: What was that question?

[33] Q Has a minor ever given a reason for not informing her parents that you found unacceptable?

A No.

Q If a minor did not want to tell her parents she was pregnant merely because she did not want them to know she had had intercourse, would that be a sufficient reason in your judgment for not informing the parents?

A If she had a specific fear about informing them of intercourse, yes, I would find that adequate.

Q Have you ever refused to perform an abortion upon a minor unless she obtained parental consent?

A No.

JUDGE FREEDMAN: Have you ever refused to perform an abortion for any reason?

THE WITNESS: Yes, often.

Q For medical reasons?

A Usually.

Q Such as what?

A Severe uncontrolled epilepsy, severe uncontrolled asthma, an orthopedic difficulty that would not allow the patient to be placed upon the table, severe anxiety that can not be overcome by our counseling or reassurance.

Q Do you instruct the counselors what to say during the counseling session?

A Well, I occasionally sit in on counseling sessions and [34] do make suggestions. I wouldn't say that I sit down and train the counselors.

Q Who does?

A To my knowledge, Mr. Baird does.

Q It is your view, I take it, that a minor is entitled to an abortion on request for any reason?

A Yes.

Q In your view then, a minor should be free to do with her body anything she wants?

A I didn't say that.

Q Well, would you say that?

A No.

Q Did you say that during the course of the deposition we held in this case?

A I don't believe so. I believe you questioned me as to specific medical procedures that I would think minors would need consent on.

Q Do you remember being asked this question:

"Q Do you think a minor should be free to do with his or her body as he or she wants?"

And the answer you gave was, "Yes".

Do you recall that?

A I assume that if it is in the deposition, I said it.

Q Well, I am reading from it.

A What you are asking me now is whether a minor [35] can do with her body, medically or surgically, what she wants?

Q Would you answer different in this situation?

A Yes.

Q Is there any surgery in your judgment that a minor should not be able to obtain without parental consent?

A Yes.

Q Such as what?

A A craniotomy, a tubal ligation.

Q Is there any reason why these procedures would require parental consent in your judgment?

A The extreme seriousness of the consequences.

Q Is it your testimony that in these situations a minor would not appreciate the consequences?

A Yes.

Q Yet in the abortion situation is it your testimony that a minor would appreciate the consequences of that procedure?

A Yes. I think the consequences are not in the same realm of severity.

Q Have you ever consulted a minor's family doctor regarding the procedures you perform at Parents Aid Society?

A Are you talking about prior to the procedure?

Q At any time.

A Not usually, no.

Q Have you ever found a situation where it would have been [36] desirable to talk to a minor's family doctor?

A Not that I can recall.

Q Did you sign an agreement or enter into any agreement making you medical director?

A Yes. I signed a one statement acceptance of the position.

Q Do you recall what it says basically?

A Basically it says, "I hereby accept the position of medical director of Parents Aid Society."

Q Who asked you to present such an agreement or sign such an agreement?

A Mr. Baird.

Q Did you understand he had authority to make that request of you?

A That was my understanding, yes.

Q In his role as director?

A Yes.

Q Is the surgical equipment used at Parents Aid Society owned by you or by the Society?

A By Parents Aid Society.

Q Do you have any data as to the youngest adolescent that has received an abortion at Parents Aid Society in Boston?

A As I stated during the deposition, I believe, I can specifically recall aborting a 14 year old patient.

Q How many abortions are done in an average week, if it is [37] possible to give an average figure?

A It varies. There is a tremendous variation. In some weeks I have done two abortions and in some weeks I have done 30 abortions.

Q Suppose a patient comes in on Saturday and wants to have an abortion. Will she be given one on that day?

A No. The normal days for performing abortions in Boston are Thursdays and Fridays.

Q She would have to wait five days to get that procedure; is that right?

A Unless she wanted to go to another facility, yes.

Q What is your on-call capability when you are away from Boston relative to situations here?

A It is a 24 hour capability. I am available by a paging device.

Q How does it work?

A Well, our office here can contact our office in New York, who could page me.

Q About how many times a week is that done?

A For patient purposes?

Q Yes.

A In other words, how many times am I paged from Boston?

Q For patient purposes.

A I would say an average of two to three times a week.

[38] Q What sort of situations might occasion these calls?

A Usually a patient's anxiety about the amount of post-abortal bleeding or cramps or low grade fever.

Q Do you know whether these calls relate to minor patients as opposed to adults?

A No, any patient.

Q Minors or adults would be represented in these calls?

A Yes.

Q Do you deliver babies, Doctor?

A No, I do not.

Q Are babies delivered at Parents Aid Society?

A Not to my knowledge.

Q Have you ever delivered a baby in Massachusetts?

A Not in Massachusetts.

Q Is your sole source of income from medical procedures you perform at the Boston and New York Parents Aid Society?

A No.

Q Do you have any other medical source of income?

A I occasionally see other patients, but it is not usual.

Q So a substantial amount of your income is derived from the services you perform at Parents Aid Society?

A The medical part of my income, yes.

Q Have you, yourself, had specific formal training in counseling?

A I went to medical school. That involves quite a bit of training in counseling.

[39] Q Beyond medical school, have you had anything of a formal nature?

A No.

Q Are menstrual abstractions performed at Parents Aid Society?

A Yes.

Q Would you tell the Court what that procedure involves?

A Yes. If a patient has not had a period anywhere up to ten days from the time she should have had her period and has a negative pregnancy test, she can have a menstrual abstraction which is done for the sole purpose of allaying the patient's anxiety about possibly being pregnant, and the menstrual abstraction consists of extensive counseling before the procedure, making the patient aware of the fact that medically the procedure is not necessary, and that it is being done solely to allay her anxiety about possibly being pregnant.

Do you want me to specifically explain what a menstrual abstraction is?

Q No, I don't think that is necessary. But do I understand there has been no determination of pregnancy?

A We perform the pregnancy test.

Q You have to make sure the patient is not pregnant?

A That's right. When I do the procedure, I do it by manual examination to determine the patient's uterine size.

Q Do you perform this proceure upon minors without parental [40] consent?

A If they so desire, yes.

Q And the consequences of unwanted pregnancy do not exist in this situation, do they?

A I am not sure what you are asking.

Q Well, you made a determination that there is no pregnancy before you performed this operation; is that right?

A When the menstrual abstraction is performed, you can not know 100% there is no pregnancy. There could be a very, very early pregnancy in existence.

Q But implantation may not have occurred to trigger the test, is that what you are saying?

A The test is not necessarily triggered by implantation. It is the amount of HCG. in the urine which might not be present at that time.

Q You indicated you see patients in the recovery room; is that right?

A Yes.

Q How long do you spend with the patient in that situation?

A In the recovery room situation?

Q Yes.

A It is brief. I just essentially go in to see how the patient is doing.

Q How long does the patient spend in the recovery room?

A On the average of a half hour to an hour.

[41] Q So in a situation where you have, say, 15 surgical procedures to perform, do you, after each one, go into the recovery room? Is that routine practice on your part?

A It is not routine that I am performing 15 procedures.

Q Well, in situations where you have a large number to perform you indicated that there were those occasions?

A Yes. The day is usually broken up. Patients are scheduled in separate groups. I am not constantly going from one procedure room to another procedure room. There are breaks. It is usually groups of five patients.

Q What are the hours that you would see patients in a given day?

A Well, most patients are scheduled to start coming in at noon, sometimes at nine o'clock, but it depends on the patient load.

Q How late do you stay open?

A Usually until nine or ten o'clock at night, but again this varies with the patient load. We have been there much later. We finish up much earlier usually.

Q Have you been there as late as 2:00 A.M.?

A Yes.

Q In situations where minors were being treated at those hours?

A Well, the younger patients we usually try to treat earlier because of problems about returning home.

[42] Q Have you had any personal contact with the Attorney General of the Commonwealth?

A No.

Q Have you had any personal contact of any kind with any of the District Attorneys in the Commonwealth?

A Just with you.

Q I am not a District Attorney.

A Oh, I thought you were.

Q Do you make any attempt to determine that the patient is giving a true name?

A No.

Q Do you think that might be important if you had to have contact with the patient later?

A Well, we don't care about the patient's name. We care about the ability to contact the patient. The patient is told that it is very important where we might be able to contact her.

Q Are you aware that Mary Moe, II could not be contacted relative to a deposition in this case?

A No.

Q Are there any situations where the Parents Aid Society or you or any of the counselors think it advisable to contact the patient post-partally?

A Yes. It happens occasionally. I would say it is rare.

Q For what reason?

[43] A It happens so rarely that I can't really recall any specific reason.

MR. BEHAR: I have no further questions.

JUDGE FREEDMAN: During the course of an abortion procedure, do you do an uterine biopsy to determine malignancy?

THE WITNESS: No.

JUDGE JULIAN: During the aspiration of the embryo —

THE WITNESS: Of the products of conception?

JUDGE JULIAN: You call it the products of conception. Another name for it is embryo, isn't it?

THE WITNESS: Yes.

JUDGE JULIAN: Is the embryo attached to the wall of the uterus?

THE WITNESS: That is correct.

JUDGE JULIAN: When it is aspirated, does that mean it is torn away from the wall of the uterus?

THE WITNESS: Yes, you could say that.

JUDGE JULIAN: Is it physically attached by tissue to the wall of the uterus?

THE WITNESS: There is a connection between the products of conception and the uterine wall, a vascular connection.

JUDGE JULIAN: I am talking about the embryo [44] itself. Do you have an aversion to referring to it as the embryo?

THE WITNESS: No.

JUDGE JULIAN: Does bleeding follow?

THE WITNESS: Yes, usually.

JUDGE JULIAN: All right.

THE WITNESS: Excuse me, Your Honor. To further answer your question about malignancy, the products of conception are examined after each pregnancy to determine that there are certain breakdown possibilities in the products of conception that can lead to a malignancy, and these tissues are examined grossly to make sure that malignancy does not exist, but there are not biopsies performed per se.

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CROSS-EXAMINATION BY MR. REYNOLDS

Q Doctor, you used the term in your discussion with the Court and during the deposition and on your direct examination and also on your cross-examination "product of conception". We are all here products of conception, are we not, Doctor?

A Yes.

MR. LUCAS: May I object to any extended inquiry on this? This is far beyond the issues in this case.

[45] JUDGE ALDRICH: He may answer.

Q It is so, isn't it, that the stage of development that you are talking about is properly referred to otherwise than as the products of conception?

A I'm sorry?

JUDGE ALDRICH: I didn't get the question.

Q Is it properly referred to otherwise than as products of conception?

JUDGE ALDRICH: Is what?

MR. REYNOLDS: I was going to state it, Your Honor.

JUDGE ALDRICH: I'm sorry.

Q The tissues which you extract from the mother with the aspirator — in other words, it is called the embryo, isn't it?

A Yes.

Q And properly so?

A Yes.

Q Thank you. You said you recall an instance where you had aborted a 14 year old. Do you recall that?

A Yes, I do.

Q In the deposition you said that you knew she was unmarried or so far as you knew she was unmarried; is that so?

A That is correct.

Q You thought there might have been a case where you had [46] aborted a 13 year old. Isn't that so?

A Yes. As I stated, I didn't recall specifically, but I believe that I did.

Q In either of those cases did you have parental consent to perform the abortion?

A Well, in the instance of the 14 year old the patient's mother was aware and, as a matter of fact, spoke with several people at the center, including Mr. Baird, but no specific writ-

ten consent was acquired, but I know the patient's mother was aware of the procedure.

Q Do you remember when that was done?

A It was either late 1973 or early 1974.

Q It is the regular practice for the Parents Aid Society to obtain the written consent of a parent if the parent is available to sign?

A No. This is not our usual practice.

Q It is not your usual practice?

A That is correct.

Q Are you familiar with the generally accepted medical practice here in Massachusetts in regard to obtaining consent of at least one parent with regard to surgical procedures performed upon a minor?

MR. LUCAS: Objection. It has not been shown this is a medical practice. It could just as well be a habit or something that is advised by counsel or something [47] for the purpose of ensuring payment.

JUDGE ALDRICH: The question is whether he knows whether there is any practice.

THE WITNESS: No, I am not aware of that practice.

Q You are aware of the fact that some of the patients you abort come to you as a result of being referred to the Parents Aid Society from Pre-Term and Charles Circle; is that correct?

A Yes.

Q Doctor, your attention was called to Exhibit 10 — to one sheet of that exhibit, but there are several pages that make up that exhibit, and I know you have looked at it before. It is correct that on none of those pages is Parents Aid Society, Inc. identified? Isn't that so?

A I believe I looked at the pages during the deposition to examine for that specifically and I think the answer is yes, except by a telephone number on the instruction sheet.

Q Typically, when a patient presents herself to Parents Aid Society and before she goes in to see you, what is done by way of a physical examination, if anything?

A The blood pressure is usually obtained and the temperature, and the patient is usually seen by a nurse to see whether there are any gross abnormalities.

Q You say that the blood pressure is usually obtained, but [48] not in every case?

A I would say routinely.

Q With regard to the patient's questionnaire which you have before you there, there are some questions that relate to physical conditions. You have a question that relates, for example, to diabetes. Is diabetes a factor that you take into consideration when you are deciding whether you should operate on a patient?

A Not unless it is severe diabetes.

Q Have you had any cases of diabetes in young women under the age of 18?

A I have never had to reject a patient because of severe diabetes.

Q But you have had them report to you that they have diabetes?

A Yes.

Q And were any of those young ladies who have diabetes on insulin injections?

A No, none have been.

Q With regard to hay fever, is that a factor that you would consider in your decision to perform the abortion or not?

A Yes, if it were severe or uncontrolled.

Q And you would take their word for that, would you?

A Yes. Well, if I heard a patient wheezing, that would be reason enough to reject the patient.

Q Have you rejected any patients under the age of 18 for [49] reasons of hay fever?

A I have rejected patients for asthma or hay fever, but I don't know the age.

MR. LUCAS: Your Honor, we object to an extended inquiry on this. The Supreme Court decision makes it clear that there are certain matters between physician and patient that are not the subject of inquiry and regulation in the first trimester. We could go on endlessly talking about hay fever.

JUDGE ALDRICH: Do you intend to go on endlessly?

MR. REYNOLDS: No, I do not, Your Honor.

JUDGE ALDRICH: Then go ahead.

Q Is there any procedure for checking the heart rate of a patient when they come in?

A Yes. I failed to say that the pulse is usually obtained.

Q Just the pulse?

A Yes.

Q You do not listen with a stethoscope to the patient's heart?

A Not usually unless the patient indicates any sort of cardiac abnormality.

Q Have you had any heart abnormalities among those young women under the age of 18?

A It is hard for me to answer these questions when you are asking me specifically about under the age of 18. These [50] are not differentiated in my mind when I am doing the history.

Q When patients are presented to you it makes no real difference whether they are under the age of 18 or over 22?

A In terms of the specific examination, yes.

JUDGE FREEDMAN: Have you rejected people because of cardiac abnormalities but you do not know the age?

THE WITNESS: Yes, I have rejected patients because of cardiac abnormalities.

Q What about anemia?

A No, we have never had to reject a patient because of anemia.

Q How about the sickle cell disease?

A No, sir, we have never rejected a patient for sickle cell disease.

Q The patient's questionnaire we are looking at — it indicates that many of these questions are for statistical purposes only. Who gathers those statistics?

A I don't gather them.

Q Do you know whether Parents Aid Society does?

A Not to my knowledge, but I really don't know. Maybe we do.

Q Does it make any difference to you in your decision to [51] perform the abortion how question No. 14 is answered?

A No.

Q There is a factor there, is there not, Doctor, which we discussed in the deposition involving the Rh factor?

A Yes.

Q The Rh factor is a serious factor, isn't it?

A In terms of the possibility of there being an Rh negative patient who is pregnant it becomes serious, yes.

Q From time to time you do, of course, run into all patients who have Rh negative, isn't that so?

A All patients?

Q Some percentage of all patients have Rh negative?

A About 15% of the population.

Q Whether above or below the age of 18?

A Yes.

Q When that becomes a factor, when your patient, regardless of age, has the Rh negative factor, what is the procedure at that point?

A Well, for one thing, we do an Rh negative determination on the patient's blood. If the patient's blood is indeed

found to be Rh negative, a further factor is determined, the Du factor. If the Du factor is negative, the patient's blood is cross-matched to the Rh immune serum, the purpose of which is to prevent problems with future pregnancies because of the Rh incompatibility. It stops [52] the patients from developing certain antibodies that can cause in lay terms blue babies.

Q Spontaneous abortion?

A Yes, it could.

Q In other words, unless the serum is given there is a real probability of future adverse consequences?

A No, I wouldn't say that.

Q You wouldn't go that far?

A No. Very often — well, I shouldn't say very often — but often the Rh factor is not a problem, especially in the first pregnancy, but is a potential danger and should be dealt with.

Q And that is dealt with at some extra charge?

A Yes. The Parents Aid Society charges $25, which is their cost, or a dollar below cost for the serum, for an injection of the serum.

Q Doctor, are you aware generally that there has been a change in the law since January 1, 1974 with respect to the age of majority here in Massachusetts?

A No.

Q Are you award of no distinction between that which existed before January 1, 1974 and prior to it?

A No, I am not familiar with that part of the law.

Q Are you aware or do you have general knowledge of any crime referred to as statutory rape?

[53] A I think statutory rape is rape on a minor. I am not a lawyer. I don't know what the term really means.

Q That exhausts your information on that?

A Yes.

Q As I understand it, your general work week is a four day work week; is that correct?

A In terms of Parents Aid Society.

Q You work two days in New York and two days here in Boston?

A That is correct.

A When your deposition was taken on December 5th, in answer to a question as to the last record you had of the number of abortions you had performed for your last stint in Boston, I believe you answered that you had been the recipient of a check for $900.

A I believe that is correct.

Q That was for two days work?

A That is correct.

Q Do you have a personal view as to whether or not a minor patient makes a decision to carry or not to carry during a pregnancy?

A Whether a minor patient elects to abort or carry through pregnancy, do you mean?

Q Yes.

A I think that is the patient's decision.

[54] Q It makes no difference to you one way or the other?

A No.

Q So far as you know, the Parents Aid Society has no facilities for those young ladies that might elect to carry full term?

A For prenatal care?

Q For any young lady that cares to carry her baby.

A I believe they usually are referred to an obstetrician.

Q From your general knowledge, Doctor, are you familiar with the adage, "Despite his good intentions, he that deals with a minor does so at his peril"?

A I have never heard that adage.

Q You have never heard that?

A No.

Q Are you familiar with the advertising campaign that is conducted by Parents Aid Society?

A Not an advertising campaign. I know there are ads in newspapers.

Q Are you consulted about the composition of those ads that are placed in the newspapers?

A Well, I believe it is just one ad. I have seen it.

MR. LUCAS: Objection. This inquiry is getting far beyond the issues in the case and even further beyond the interests of the intervenors.

JUDGE JULIAN: I understand the law of [55] Massachusetts prohibits or at least medical ethics prohibit a doctor from advertising. I suppose the purport of the question is whether or not this doctor is doing it indirectly.

MR. LUCAS: There is a case before the Supreme Court —

JUDGE JULIAN: I am not concerned with that. There is no decision of the Supreme Court on the matter.

MR. LUCAS: We submit he has not laid a proper foundation to show anything illegal or unethical about advertising, much less that it is relevant to the case.

Q I ask you, Doctor, if that is the ad with which you are familiar?

A Yes, that is the ad.

Q That is the ad that appears regularly in a newspaper here in Boston?

A I can't testify as to the regularity of it, but it is an ad I have seen placed in newspapers in Boston, yes.

MR. REYNOLDS: I would like to submit this in, Your Honor.

MR. LUCAS: We object to the receipt of this.

JUDGE ALDRICH: We will take it. Whether it is relevant or not, we will decide later.

THE CLERK: Defendants' Exhibit A.

(Ad marked Defendants' Exhibit A.)

MR. LUCAS: Could I see the full paper to see [56] if there are any other advertisements of a similar nature?

JUDGE ALDRICH: Yes.

Q I believe, Doctor, on your cross-examination by Mr. Behar, in describing the procedure by which the party is aborted, you said that there is a gentle curettage.

A Yes.

Q Is that a cutting?

A No, it is not.

Q Is it a scraping?

A It is a scraping, that's correct?

Q What do you scrape?

A The uterine wall.

Q Do you apply a tool to do that?

A Yes, a uterine curette.

Q What is its size and general character?

A It is about 15 inches long and it has a bulbous stainless steel handle. It has a think shaft of stainless steel and a loop end with a sharp edge for scraping the wall.

Q Is the usual thing in that situation to have bleeding, isn't that so?

A Yes, that's correct.

Q As a matter of fact, bleeding after an abortion lasts for some four to ten days or so, isn't that right?

A It is possible. The most common situation is two to [57] three days. I might add for your edification that it can last longer than ten days, but that is not the common situation.

JUDGE FREEDMAN: Do you mean a flow or a stain?

THE WITNESS: Usually just a stain. For the first two or three days there is usually a flow of two ounces a day, but usually beyond that there is perhaps what you would describe as a stain.

JUDGE FREEDMAN: Have you ever had a case where there was an abnormal amount of flow and a transfusion was necessary for the patient?

THE WITNESS: Not that ever required a transfusion or any intravenous fluids, no.

Q It is not uncommon at Parents Aid Society to have several girls at one time giving pseudonyms for their names, isn't that so?

A It is possible. I am not knowledgeable as to that.

Q Do you make a check of the patient's name?

A No. Me, personally? No.

Q Yesterday you said that you were concerned about the potential enforcement of the statute, and I gather it is your intention to be law abiding, isn't it, Doctor?

A Yes, it is.

Q And if the statute in question is upheld, you will obey the [58] law, will you not?

A Yes, I will.

Q Doctor, it is my understanding from your deposition that as a general rule the patient who has been aborted leaves your premises about a half hour after the procedure is performed.

A A half hour to an hour on the average, I would say, yes.

Q What is the total length of time in the general run of things a patient is on the premises?

A Usually four to six hours.

Q With regard to the arrangements — you testified that you are a contract physician.

A That is correct.

Q As I recall it, at the deposition you said there was an annual accounting between you and Parents Aid Society with respect to the expenditure for nurses and the operating room.

A For the nurses on the days I am treating patients, yes.

MR. LUCAS: Objection. We are going far beyond the interests of the intervenors.

JUDGE ALDRICH: It seems to be starting out that way.

MR. REYNOLDS: I will end quickly, Your [59] Honor. This is on the issue of whether or not he is in fact an independent contractor as opposed to an employee.

JUDGE ALDRICH: Go ahead.

Q And you reimburse them 50% of that amount, is that so?

JUDGE ALDRICH: What amount?

MR. REYNOLDS: Of the total amount that has been expended for nurses through the year who have been present while he is operating.

A The cost of the nurses hired for the days when I am operating is split between me and Parents Aid Society.

Q And bring no tools to Parents Aid Society, do you?

A No medical tools, no.

Q With regard to where your facility is located, it is just off Copley Square, on Bolyston Street, isn't it?

A That is correct, 673 Boylston Street.

Q It is just across the street from the new addition of the Public Library?

A That is correct.

Q Thank you, Doctor.

A You are welcome.

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[60] RE-DIRECT EXAMINATION BY MR. LUCAS

Q Dr. Zupnick, are you familiar with the adage that the Bill of Rights is not for adults only?

A I am not familiar with it really

Q Referring to the exhibit I have handed you, would you look at Page 23 and tell the Court whether you see any advertisement there for any abortion facility?

A Yes, there is one for the Crittendon Clinic.

Q Would you look at Page 28?

A Yes.

Q Do you see one?

A Yes, there is one for Pre-Term.

Q Would you look at Page 39?

A There is an advertisement there for New England Women's Services.

Q Do you think these ads are useful for informing patients of the availability of abortion services in the Commonwealth?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Sustained.

Q Are you familiar with the medical and organizational practices at abortion facilities other than the two you have worked in to some degree?

A To some degree, yes.

Q In your experience is the method of payment at Parents Aid [61] Society common to these other facilities — the method of determining fees, I should say, of the physicians?

A I assume so, yes. To my knowledge it is common.

Q In your experience as a physician, is it regarded as proper and ethical?

A Yes.

Q Do you know of any case where it has ever been challenged as not being proper and ethical?

A No.

Q Do you know the number of abortions that are done in free-standing facilities in the United States each year, approximately?

A I can't give you that number.

Q Do you know whether or not menstrual extractions are widely done in the United States?

A They are done in the United States, but I would say not as commonly as abortions. It would be a much smaller number.

Q Do you know whether or not the United States Government has financed menstrual extraction programs throughout the world?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I must say I am sorry we got into this at all. I haven't seen the relevancy. I can't [62] blame you for asking questions since the defendants opened it up.

MR. LUCAS: That is the last question.

JUDGE ALDRICH: Go ahead.

Q Are you familiar with United States Governments abroad?

A No, I am not.

Q Do you find that the questions minors ask any different from the questions adults ask at Parents Aid Society?

A As a general range of questions, no.

Q Do you regard Mr. Baird as an expert counselor?

A Yes.

Q Do you regard him as qualified to train other counselors?

A Yes.

MR. BEHAR: Objection.

JUDGE ALDRICH: He may have it.

MR. LUCAS: No further questions. Thank you.

THE WITNESS: You are welcome.

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RE-CROSS EXAMINATION BY MR. BEHAR

Q If parents are involved and do come into Parents Aid Society with their minor daughter, do they sign anything?

A I don't believe so, no.

Q So even with the parents you have no knowledge of parents signing anything?

[63] A No, I don't believe so.

Q Do you receive a fee if no abortion is performed on a particular patient?

A No.

Q The other forms —

A Let me qualify that last answer. If I examine a patient and she is found to be over 12 weeks gestation, a ten dollar fee is charged for that examination, assuming the patient is not being done for free, and I share in the ten dollar fee.

Q The other forms besides the consent form, did you write those forms?

A No, I didn't write any of these forms.

Q Do you know who did?

A No.

Q They were just there when you showed up?

A Yes.

Q Do you have any personal recollection of any of the Mary Moes in this case?

A No, I don't.

Q You indicated yesterday that you didn't think there was any rational medical or psychological reason for requiring the consent of both parents in this situation; is that right?

A Yes.

Q In your judgment — [64]

JUDGE ALDRICH: Is this re-cross examination?

MR. BEHAR: I would ask the Court's indulgence for two questions.

JUDGE ALDRICH: All right.

Q Is there any rational medical or psychological reason for requiring the consent of one parent in your judgment?

A No.

Q Emotional support is not a rational reason in your judgment then?

A I didn't say emotional support. You asked me about consent. Emotional support is always important. You asked me about consent.

Q You don't think that parental involvement, which is attached to consent, can provide that emotional support?

A It can, but you don't have to have consent to have that emotional support from a parent.

MR. BEHAR: I have no further questions.

JUDGE ALDRICH: Mr. Reynolds, do you have anything further?

MR. REYNOLDS: No, thank you, Your Honor.

JUDGE ALDRICH: Mr. Lucas, would you be willing to state for the record, because there was no reporter present yesterday afternoon, what you are prepared to stipulate?

MR. LUCAS: We are willing to stipulate that [65] we are challenging the statute only on its face as opposed to as applied.

JUDGE ALDRICH: Under those circumstances, I would like to inquire of the defendants whether there is any need of taking the testimony of Mary Moe, I?

MR. BEHAR: May we have a moment?

JUDGE ALDRICH: Surely.

MR. BEHAR: I would ask the Court whether a recess could be taken at this point.

JUDGE ALDRICH: Yes.

MR. BEHAR: Thank you.

(Recess)

MR. BEHAR: Your Honor, we are not agreeable to the suggestion.

JUDGE ALDRICH: Under those circumstances, would it be appropriate to take the testimony in camera at two o'clock?

MR. BEHAR: Yes, Your Honor.

MR. LUCAS: Yes, Your Honor, it would be. We do suggest it would be proper for the Court, in light of the fact one of the plaintiffs has testified on the standing issue and the law is being challenged on its face, not to require any further testimony.

JUDGE ALDRICH: I would hope counsel would see it that way, but we can not insist on it.

[66] MR. RILEY: We made a request, Your Honor, for the identity of Mary Moe, I and Mary Moe, III for the purpose of cross-examination if she takes the stand. We would ask the Court for an order compelling the plaintiffs here to reveal the identity of Mary Moe, I and Mary Moe, III.

JUDGE ALDRICH: We will face that at two o'clock.

MR. LUCAS: We do have Mr. Baird available to testify.

JUDGE ALDRICH: We will take Mr. Baird until one o'clock.

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JANUARY 28, 1975.

[3] MR. BEHAR: Very well. The defendants call Dr. Jules Rivkind.

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JULES RIVKIND (SWORN)

DIRECT EXAMINATION BY MR. BEHAR

Q Would you please state your name and address for the Court, spelling your last name?

A Jules Rivkind, R-i-v-k-i-n-d, Pittsburgh, Pennsylvania.

Q What is your occupation?

A Physician specializing in obstetrics and gynecology.

Q Are you licensed to practice medicine in some states?

A Yes.

Q Would you identify them?

A New York, Connecticut, California, Pennsylvania.

Q What is your current position?

A Chairman of the Department of Obstetrics and Gynecology at Mercy Hospital and Director of the Residency Training Program.

Q How long have you held that position?

A Since January 1, 1971.

Q Could you state your duties and responsibilities in these capacities?

A As Chairman of the Department in consultation with our staff we establish policies and assure the implementation of those policies within the department, and act with the other chairmen in establishing generalized [4] medical policy for the hospital and to act in concert with the other ancillary services, the nursing services, and so forth, to ensure the highest possible patient care.

Q Will you briefly sketch for the Court your medical training?

A I was graduated from the New York University College of Medicine in 1955 with an M.D. degree. I next took a surgical internship at St. Vincent's Hospital Medical Center in New York, followed by two and a half years as a flight

surgeon in the United States Air Force specializing in the transportation of patients requiring total respiratory assistance.

I returned to New York for four years of training in obstetrics and gynecology at St. Vincent's Hospital Medical Center. This was followed by a year of fellowship during which time I was in charge of the teaching program for the medical students at what at that time was Seton Hall Medical School, which later became the Medical School of the State of New Jersey.

I then joined the Chairman of the Department as his associate in practice, eventually becoming chief of clinical obstetrics.

Q Could you sketch in any other detail your clinical background in addition to your present position?

A In addition to that, during my tenure in New York [5] I acted for several years as a consultant and clinician to the New York City Health Department specifically in the areas of psychology and juvenile venereal disease.

Just prior to leaving, we also incorporated the in-patient service at Columbus Hospital in New York City, and I became chief of clinical obstetrics at Columbus Hospital as well.

Q I show you a four-page document and ask you to identify it.

A Yes. This is my curriculum vitae.

MR. BEHAR: I would offer this as an exhibit.

THE CLERK: Defendants' Exhibit D for Identification.

JUDGE ALDRICH: No, it is in evidence.

THE CLERK: D in evidence.

(Curriculum Vitae of Jules Rivkind, M.D. marked Defendants' D.)

Q Doctor, do you routinely keep up with the literature regarding obstetrical and gynecological problems?

A Yes, I do.

Q Are you familiar with techniques for termination of pregnancy?

A Yes, I am.

Q Could you identify those techniques?

A There are several. The most widely used at the present time is dilation and curettage, followed by vacuum aspiration, saline abortions and hysterotomies are also used.

[6] Q Have you had occasion to utilize these techniques yourself in the course of your professional practice?

A Yes, I have.

Q There arise occasions when continuation of pregnancy may be detrimental to the life of the mother or fetus, usually both. In those instances a premature delivery, a termination of pregnancy without prejudice, is frequently indicated. We act in consultation with those experienced in the specialized fields of medicine and will terminate the pregnancy without prejudice as far as the outcome goes.

JUDGE FREEDMAN: You mean as far as future pregnancies?

THE WITNESS: No, as far as that particular pregnancy and the infant. Our end point is a living baby and a healthier mother. I have not performed abortions using these techniques.

JUDGE ALDRICH: I didn't get the last few words.

THE WITNESS: I say I have not performed abortions using these techniques. But these techniques are not unique. They are used for a wide variety of purposes.

Q I think, to help the Court, you draw a distinction between abortion and termination of pregnancy, as I understand it?

[7] Yes, I do.

JUDGE FREEDMAN: Is another name for this procedure forced labor to bring about delivery?

THE WITNESS: Induced or forced labor, yes. With the Court's indulgence, I would like to say that the end point is different.

Our purpose is to ensure, as I said, a healthier mother and a live birth.

JUDGE ALDRICH: What about first trimester procedures? Have you ever performed any?

THE WITNESS: Not in the abortion context.

JUDGE ALDRICH: In what context have you performed them?

THE WITNESS: When presented with a patient who has an incomplete abortion, we will complete it using these techniques.

JUDGE ALDRICH: Suppose the patient has had no incident of abortion?

THE WITNESS: These techniques are also used for diagnostic purposes.

JUDGE ALDRICH: The question was have you used them?

THE WITNESS: Yes, I have. We have also used them in the instances of missed abortions when the pregnancy has begun but then has ceased, the patient has failed to pass the products, we will perform these same techniques.

[8] Q Doctor, in the course of your professional practice do you have occasion to treat women who have had abortions?

A Yes, I do.

Q About how many such patients have you treated?

A The number varies from week to week, but I would say on the average of four to five a week.

Q Do these patients include adolescents under 18 years of age?

A Yes, they do.

Q Under what circumstances do you treat patients post-abortally?

A For post-abortal complications primarily.

Q How do these patients come into the Mercy Hospital, for example?

A Being a downtown hospital with a very active emergency room and a gynecological clinic, we accept for treatment any woman who presents herself to us. We have an active downtown clinic, abortion clinic, which has limited hours. They do not have 24-hour service. Frequently, the patients are told that if a problem arises, to come to the nearest hospital.

Q What complications following abortion have you been concerned with among these patients?

A Well, the majority of the patients present themselves either with fever or pain, which is indicative of infection, or with excessive prolonged bleeding or blood loss.

Q Are these considered major complications from this procedure?

A Yes.

Q Are these complications discussed in the medical literature?

A Yes, they are.

Q Doctor, based upon your education, training and experience, do you have an opinion as to whether the complications you have mentioned pose a greater risk to adolescents under 18 as opposed to adults?

A Yes, I do.

Q What is your opinion?

A That they do indeed pose a greater risk, not only in terms of immediate complications, but in terms of their implications for future reproductive history.

Q What are those implications?

A The literature from throughout the world suggests that in the interruption of a first pregnancy subsequent pregnancies are exposed to increased risks in all aspects of obstetrical

practice, including premature deliveries, spontaneous mid-trimester abortions, faulty implantation with errors of placental development.

MR. LUCAS: I object to the question. There is a lack of foundation. I think there is no basis for this opinion. He referred to the literature throughout the world without giving us any description of it.

[10] JUDGE ALDRICH: He may answer.

Q Is your opinion, in addition to your education, training and experience, also based upon your studies of the literature?

A Yes, it is.

Q Would you please continue.

A The incidence of cervical incompetency was well established long before the present interest in abortion. Most obstetricians when interviewing patients for the pre-natal history would inquire as to whether or not there has been any interruptions of pregnancy prior to that pregnancy under care. Their blood loss tends to be greater.

In addition to that, the incidence of dystocic labor, labor which has progressed badly or poorly, is increased in women who have had one or more abortions. Not only that, but from the literature, and here we would depend upon the literature particularly from Eastern Europe, there is an increased incidence of spontaneous abortions in women who have had previous therapeutic abortions.

JUDGE ALDRICH: Doctor, if I understood the question that was asked you and which you have been answering, it was whether or not there was any greater risk with respect to minors having abortions than those who are not minors.

THE WITNESS: Yes.

[11] JUDGE ALDRICH: Are all those things you are telling us more noticeable, more likely in the case of minors than they are in the case of adults?

THE WITNESS: Yes, sir, because for the minor the pregnancy under consideration tends to be their first and the woman —

JUDGE ALDRICH: That does not answer my question. If I am 24 year old woman, it may be my first, too. Are you drawing a distinction between an 18 year old woman and a 17 year old woman?

THE WITNESS: No. The distinction —

JUDGE ALDRICH: Excuse me?

THE WITNESS: The distinction I am drawing is between a woman in her first pregnancy, having an interruption, and a woman who has an interruption after several pregnancies and probably will have no other pregnancy in the future.

JUDGE ALDRICH: All right. I will note for the record that none of your answers have been responsive to the question, but they may stand.

Q Doctor, what does the term morbidity mean in relation to abortion?

A Complications.

Q Are the complications you have enumerated in your last answer typical of morbidity problems?

A Yes, they are.

Q Doctor, based upon your education, training, experience [12] and studies of the literature do you have an opinion as to the state of medical knowledge on morbidity problems?

A Yes.

Q What is that opinion?

A It is woefully lacking.

JUDGE ALDRICH: None of us heard what is woefully lacking.

THE WITNESS: Knowledge of morbidity concerning therapeutic abortions.

JUDGE JULIAN: What do you mean by morbidity?

THE WITNESS: Morbidity would be complications taken as a general class.

JUDGE ALDRICH: It is woefully lacking where — in this courtroom?

THE WITNESS: In the medical profession.

JUDGE ALDRICH: All right. Why don't you say so?

THE WITNESS: I have, sir.

MR. BEHAR: I'm sorry. That was the question.

JUDGE ALDRICH: We didn't hear any of it.

MR. BEHAR: I'm sorry.

Q Doctor, based upon your education, training, experience and studies of the literature, do you have an opinion whether a therapeutic abortion is a safe procedure?

A Yes, sir, I do.

Q What is that opinion?

[13] A That it is not.

Q And could you explain the reasons for that opinion?

A Although there is a great deal of divergence in morbidity rates, and that is what tempered my answer to the previous question, the average rate appears to be about 8% to 9% morbidity in early abortions. This, for an elective operation, is a rate which most individuals would find unacceptable.

Q Does Mercy Hospital do elective surgery?

A Yes.

Q Do you have patients showing up with complications at the same rate for those procedures as show up with complications for abortions?

A Only for the most serious of operations. May I explain?

Q Yes, please.

A Our morbidity or complication rate for radical hysterectomy is approximately 10%. Anyone will question the circumstances under which an elective operation is performed if the complication rate is much more than 5%.

Q In the course of your professional career, have you delivered babies?

A Yes, I have.

Q Approximately how many?

A Perhaps, well, almost 10,000.

Q Did the mothers involve adolescents under 18?

[14] A Yes.

Q Based upon your education, training, experience and studies of the literature, do you have an opinion as to whether childbirth in an adolescent poses a greater risk than childbirth in an adult?

A Yes.

Q What is that opinion?

A Based upon the latest information, it does not carry a greater morbidity threat. May I expand?

Q Please do.

A Recently a collaborative study was completed which encompassed some 60,000 pregnant women. The findings of that study ran contrary —

MR. LUCAS: Objection, unless he identifies the study and participated in it. Otherwise, he is just telling us what is in a periodical which we have no knowledge of.

JUDGE ALDRICH: The name of that study was what?

THE WITNESS: Collaborative Study — Women and Their Pregnancies.

JUDGE ALDRICH: Who made it?

THE WITNESS: There were several authors.

JUDGE ALDRICH: Were you one?

THE WITNESS: No, I was not.

JUDGE ALDRICH: I think the best answer to that would be to produce it.

[15] MR. BEHAR: Are you excluding the further answer?

JUDGE JULIAN: I think it should be admitted.

JUDGE ALDRICH: I don't question it should be admitted, but a summary of a study as a distinct study — the best evidence is what is the study itself.

MR. BEHAR: I won't press the question.

Q Doctor, based upon your education, training, experience and studies of the literature, do you have an opinion whether therapeutic abortion constitutes a greater medical risk to an adolescent under 18 than delivery?

A Yes, I do.

Q What is that opinion?

A They carry about equal risks.

Q In your judgment, is therapeutic abortion a surgical procedure?

A Yes, it is.

Q Do you yourself regularly perform gynecological surgery?

A Yes, I do.

Q Upon both adolescents under 18 and adults?

A Yes.

Q Based upon your education, training, experience and studies of the literature, do you have an opinion as to what constitutes proper and accepted medical practice regarding obtaining parental consent for surgery being performed upon a minor?

A Yes.

[16] Q What is the opinion?

A That with the exception of the situation in which any delay would be hazardous to the life of the patient, we attempt to involve the patient in the permission for whatever procedure is going to be performed.

Q What do you understand the policy reasons behind this accepted medical practice as you see it?

A That the minor has not that basis of experience to make a valid judgment as to the necessity for the procedure or the safety of the procedure.

Q Is it proper medical practice to obtain parental consent on the type of anesthetic or the kind of anesthesia being employed?

A Consent is required for several aspects of any procedure and anesthesia is one of them, and blood transfusion is another, in addition to the operation itself.

Q Is an accepted medical practice in your judgment not to obtain parental consent where local anesthesia is employed?

A No. We obtain consent whenever anesthesia is employed.

Q Is there any medical reason why parental consent should not be obtained for abortions?

A No.

Q Regarding the adolescent, and by that I mean under 18, patients that you have treated who have suffered abortion [17] complications, do you routinely discuss the abortion operation with them?

A It is a necessity, yes.

Q Why do you do that?

A In order to ascertain what the cause of the problem was.

Q In the course of these discussions, do you form opinions as to their understanding of that operation?

A Yes, I do.

Q Doctor, based upon your education, training, esperience and studies of the literature, do you have an opinion as to whether 16 year olds as a class can give an informed consent to an abortion?

A Yes, I do.

Q What is that opinion?

A It is my opinion that they do not have the basis of experience for making an appropriate judgment.

Q Have any of the adolescents under 18 you have treated for abortion complications obtained the abortion without parental consent in some instances?

A Some have, yes.

Q Were the parents notified relative to the complications?

A Yes, they were.

Q Did you have occasion to discuss the reasons why the parents were not notified of the abortion originally?

A Yes.

Q What were some of those reasons?

[18] A Primarily on the part of the patient hesitancy to discuss the subject with her parents. There is usually an antecedent problem in the family relationship. Occasionally, it is a fear of reproach, reprimand, and occasionally it is because of a total inability to discuss matters of sexuality between the adolescent and her parents.

Q Doctor, can you generalize as to the reactions of parents who first learned of their daughter's situation at the complication stage?

A Frequently the initial response is one of disappointment that the adolescent did not feel able to discuss the problem with her parents. Next, many, many parents demonstrate a sense of disappointment.

But I have yet to see any parents walk out of the emergency room or the clinic and leave their child because of this.

Q Doctor, based upon your education, training, experience and studies of the literature, do you have an opinion as to whether parental involvement in a minor faced with a decision whether to continue or terminate pregnancy would be beneficial to that minor?

A Without question.

Q In your experience, do doctors bring different degrees of sensitivity and expertise to a particular surgical procedure?

A Yes, they do.

[19] MR. BEHAR: I have no further questions of this witness.

* * * * *

CROSS-EXAMINATION BY MR. LUCAS

Q What hospitals do you currently practice in in Pittsburgh?

A Mercy Hospital and St. Claire's Hospital.

Q Is Mercy Hospital a public hospital?

A No, it is not.

Q Are abortion procedures performed at all at Mercy Hospital?

A No.

Q Are elective sterilization procedures performed there?

A No.

Q Is it true that they do not even have birth control pills in the pharmacy at Mercy Hospital?

A No, that is not true.

Q Under what circumstances are birth control pills prescribed from the pharmacy there?

A The clinic pharmacy does have them for control of gynecological problems. Perhaps this is a misunderstanding. The term birth control pills is a most convenient one. But the combination of hormones is useful in many, many other instances above and beyond contraception.

Q They are never prescribed for elective contraception from the hospital clinic?

[20] A They may be if in the opinion of the physician it is in the patient's best interests that she remain anaboratory, yes.

Q To what extent have they been prescribed in the patient population in the last year?

A Fairly widely.

Q What are the background policies that control or what is the source of the policy on the abortion practice at Mercy Hospital?

A I'm sorry. I don't understand.

Q Is Mercy Hospital governed by the ethical directives of the U.S. Catholic Conference?

A Yes, it is.

Q Does the hospital receive Federal funds?

A Yes, it does.

Q Have you attended any medical or non-medical conferences on the subject of reproductive medicine in the last two or three years?

A Yes, many.

Q Could you describe which conferences you have attended?

A Primarily those of Planned Parenthood, the American College of Obstetricians and Gynecologists, both regional and national, conferences sponsored by the Family Planning Council of Southwestern Pennsylvania, now the Family Planning Council of Western Pennsylvania, of which I am a member of the Board of Directors, and meetings of the American Medical Association, meetings [21] of our Pittsburgh Obstetrical Society, meetings of the American College of Surgeons, and so forth and so on.

Q Have you attended any conferences of organizations that are opposed to elective abortion?

A That are opposed to elective abortion? Yes.

Q Could you tell me which conferences of those you have attended?

A I had been active in Pennsylvania for Human Life until about six months ago.

Q What does that organization do?

A It is involved in educating primarily and to some extent it acts as a reference source for patients who find themselves in difficult pregnancy and who are seeking alternatives to abortion.

Q Did that organization lobby against the Pennsylvania Abortion Law recently enacted last fall?

A Yes, it did.

Q Did you testify before the legislature on that statute?

A Yes, I did.

Q And in your testimony there did you express the opinion that all forms of contraception caused some sterility in the future?

A No, I did not.

Q Have you ever expressed that opinion in a public statement?

A To the best of my knowledge, I never did.

[22] Q Have you been involved at the national level in any of the Right to Life organizations?

A No.

Q Are you not a member of the National Right to Life Committee?

A No, I am not.

Q Have you given any talks at the Right to Life meetings?

A Locally in Pittsburgh, yes.

Q Any on a state-wide or national basis?

A No, none.

Q Have you written any articles on the subject of adolescent pregnancy?

A No, I have not.

Q Did you testify in court in the Pennsylvania case involving parental consent and other restrictions last fall?

A No, not to the best of my knowledge. The only hearing that I Participated in was a panel — it was the Govenor's Select Committee that I testified before.

Q Did you support the parental consent restriction in your testimony?

A Parent consent was not under consideration at that time.

Q In Pennsylvania?

A Not in my testimony or at the time of the hearing that I participated in.

Q What was the scope of your testimony?

[23] A Primarily as to the medical aspects of abortion.

Q I notice from your curriculum vitae that the first two articles you are a co-author of have to do with the rhythm method of birth control. Is that the primary method you advocate?

A No, it is one of several options we offer to our patients.

Q Do you regard that as having a high degree of accuracy?

A Statistically it is equivalent to the use of the condom.

A Or the diaphragm alone?

A Yes.

Q I notice also you have written articles on the subject of venereal disease. Have you ever treated patients with venereal disease problems who are minors?

A Many, many times.

Q Are you required to notify the parents in Pennsylvania when you do this?

A No, we are not.

Q Do you notify the parents?

A No. This is an exclusion under the Pennsylvania law.

Q Why do you not notify them, because you are not required to?

A We do so after consulting with the patient. If she wishes to, we do, and if she doesn't, we don't.

Q This is with all minors you treat for venereal disease [24] problems?

A Yes, acting under the law of the State of Pennsylvania.

Q I presume you regard these minors as capable of consenting to treatment for venereal disease?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: He may answer.

A They have been declared competent by the State of Pennsylvania and I would not question that.

Q I notice you are a member of the American College of Obstetricians and Gynecologists. Do you support their policy position on abortion?

A No, I don't. There are many who do not.

Q Under what circumstances do you think any abortion is permissible?

A I think that if it can be objectively demonstrated that the life of the mother is placed in jeopardy by continuation of the pregnancy, that that pregnancy may be terminated.

Q Have you performed any abortions under circumstances other than those you just described in the entire course of your medical career?

A I have not performed abortions under any circumstances.

Q Have you had any experience with minors who were so-called battered children?

JUDGE JULIAN: What kind of children?

[25] MR. LUCAS: Battered children.

JUDGE ALDRICH: Battered?

MR. LUCAS: Yes.

JUDGE JULIAN: What is a battered child?

MR. LUCAS: It is a common term, children abused by their parents.

JUDGE JULIAN: Assault and battery committed on them?

MR. LUCAS: Yes. It is a common syndrome. A number of books have been written on it.

JUDGE JULIAN: Do you understand the question?

THE WITNESS: Yes, I do.

JUDGE ALDRICH: Go ahead.

MR. REYNOLDS: Objection.

MR. BEHAR: Objection.

JUDGE ALDRICH: He may answer.

THE WITNESS: May I answer?

JUDGE ALDRICH: Yes.

A Yes, I have. I had the fortune of training under the physician who originally described the syndrome, Dr. Vincent Fontana, at St. Vincent's Hospital in New York.

Q Have you dealt with a large number of these cases?

A No. I don't think any single physician has.

Q Do you regard the parents of these battered children as competent to withhold consent for medical treatment of those minors?

MR. BEHAR: Objection.

[26] MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q Do you regard all 17 year olds as a class as incompetent to consent to an abortion procedure?

A No. I think there are some who are mature enough to handle a decision of that sort.

Q Would you say a large proportion are capable of making such a decision?

A No. Some are.

JUDGE JULIAN: Did you say 17 or 18?

MR. LUCAS: Seventeen.

JUDGE JULIAN: Is that what you asked him?

MR. LUCAS: Yes, Your Honor.

Q Are they capable of understanding the future life consequences of the choice between having an abortion and going through pregnancy at age 17 as a class?

A Some are.

Q Are 17 year old married patients any more competent than unmarried patients or are they about the same?

A I would say they had an additional experience which has perhaps made them more competent.

Q Are there many cases where being married and under 18 would make them less competent?

JUDGE ALDRICH: I couldn't hear your question.

Q Are there many cases where being married and under 18 would make them less competent in your experience?

A I would have no basis for answering one way or the [27] other.

Q What has been your experience with reproductive health problems of married minors under age 18?

A That they tend to be no different from their older peers.

Q Do you think parental consent ought to be required for an abortion for a married minor under 18?

MR. REYNOLDS: Objection.

MR. BEHAR: Objection.

JUDGE ALDRICH: Excluded.

Q In your description of the risks in subsequent pregnancies caused by abortion were you relying on the Japanese literature?

A No.

Q Were you relying solely on the Eastern European literature?

A No.

Q What literature were you relying on?

A Reports from England, Scandanavia, Eastern Europe, which I think are more pertinent than those in Japan, and which have been limited.

Q Could you specifically identify any of those reports?

A There was a report of the Maternal Health Committee of Denmark in the early 1960's that indicated the same tendency at that time.

Q What percentage of spontaneous abortions is increased by the fact of a prior abortion according to that study?

[28] A Perhaps as much as 5%.

Q Denmark still permits elective abortion, doesn't it?

A Oh, yes.

Q Isn't it true every one of the countries you named in connection with those studies permits elective abortions?

JUDGE JULIAN: Are you talking about adolescents under age 18 or generally?

MR. LUCAS: Generally speaking.

JUDGE JULIAN: Are we concered with that? I thought the case before us dealt with adolescents under the age of 18.

MR. LUCAS: I agree that it does. I would like to ask him the specific question whether there is any difference.

THE WITNESS: May I have the question repeated, please?

Q Isn't it true that each of the countries you named, Scandanavia and the Eastern European countries, permit elective abortion at this time as a matter of their law?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: If we are going to go into these countries, are we going to stop at any particular place?

JUDGE JULIAN: I don't see the relevancy of going into adults. I thought we were dealing with adolescents. with minors under the age of 18.

[29] MR. LUCAS: The only point I was trying to make is that the testimony had suggested that complications of abortion somehow were a reason for not permitting abortion, and I wanted to point out each one of these countries permits elective abortion and that the witness knows that.

JUDGE ALDRICH: Are you going to ask the witness about abortions for minors in those countries?

MR. LUCAS: Yes, Your Honor, I am.

THE WITNESS: May I answer?

JUDGE FREEDMAN: You may.

A Yes. Indeed these countries do have policies permitting elective abortion. However, three of them have limited severely within the last three years abortions available to minors in their first pregnancy.

Q Haven't these countries done this limitation solely for population control, perhaps consistent with the political philosophy of those countries?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I don't know how the witness can answer that.

Q Do you know what the stated governmental reason was for making those limitations on abortion?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Counsel, if you would open your mouth, please? I didn't hear any of that question.

Q Do you know what the stated governmental objection was [30] in making those restrictions on abortion?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: If they are in the reports he relied on, that is a proper question.

A They were not in the reports to the best of my knowledge.

Q Do you know what type of medical techniques were used for terminating pregnancy in the Eastern European and the Scandanavian countries that you mentioned earlier?

A In general, yes; specifically, no.

Q Isn't it true in general they did not use the vacuum technique?

A I don't know that to be true.

Q Do you know whether or not they used dilatation and curettage rather than suction?

A I don't know that to be true.

Q You don't know what type of technique they used?

A Yes. They used both methods, but what percentage of each, I don't know.

Q Do you know when the vacuum method was introduced into those countries?

A Yes.

Q What year was that?

A Approximately 20 years ago.

Q I believe you testified abortion was not a safe procedure in your opinion.

A Yes, that is true.

[31] Q Are you aware 90% of the first trimester abortions in this country are performed outside of hospitals?

A Yes, I am.

Q Are there any other major procedures you know of that are performed outside the hospital?

A No, I don't, but that does not necessarily make it safe.

Q You testified concerning what is acceptable medical practice for obtaining the minor's consent or whether or not to obtain the minor's consent is good medical practice. Aren't there many factors other than medical considerations that go into the decision to obtain parental consent?

A I am acquainted with the medical. I must admit I have no knowledge of other factors.

Q With veneral disease, don't you rely on the state law as a reason for not obtaining parental consent? Didn't you say that earlier?

A Yes. The state law enables the minor to seek treatment without parental consent.

Q If the state law enabled you to treat a minor for an abortion procedure, assuming you did them, wouldn't that be the same type of situation?

MR. BEHAR: Objection.

A No. They are two entirely different matters. It is like comparing apples and bananas.

Q Would you draw a distinction between parental involvement [32] and allowing parents to withhold consent for any reason?

MR. BEHAR: Objection as to form.

JUDGE ALDRICH: I'm sorry. May I have the question again?

MR.LUCAS: Let me rephrase the question.

Q I believe you testified earlier concerning the desirability of having parental involvement. Would you make any distinction between the desirability of having parental involvement in the abortion decision as opposed to the desirability of allowing the parents to withhold consent for any reason?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I didn't hear the first question and I don't understand the second one.

Q With regard to abortion, you testified that it was desirable to have parental involvement in your opinion?

A Yes.

JUDGE ALDRICH: So did your witnesses. We don't have any problem there.

MR. LUCAS: That is probably the only thing both sides agree on.

Q Do you think it is desirable to allow the parents to withhold consent for any reason suitable to the parents?

MR. BEHAR: Objection.

JUDGE ALDRICH: I think that should be limited to his medical views. He is not a philosopher [33] or a legislator.

Q Do you think it is desirable to let the parents have the final decision from a medical standpoint whether the minor is going to have an abortion?

MR. BEHAR: Objection.

JUDGE ALDRICH: He may answer.

A I think that it is a matter of involving all. I can not see one group making the decision without the consent of the other.

Q How do you resolve the conflict of patient and parent when you have a minor patient?

A Well, not in this particular frame of reference, but we have had situations primarily in terms of blood transfusion, and we have had recourse to the court and requested the court to act as guardian for the minor.

Q Have you done that in instances to obtain treatment for the minor when the parents objected?

A Yes, and parenthetically, we have never been refused.

Q Do you find parents as a class have a better understanding of the abortion procedure than the minors do?

A In general, I would say yes, particularly the risks.

Q What percentage of the parents that you encounter of abortion patients or post-abortal patients — what percentage of those parents have any training in gynecology?

MR. BEHAR: Objection.

[34] JUDGE ALDRICH: I think that is getting far afield.

Q Is it a reasonable statement to say that you are actively involved in attempting to have the Supreme Court decision overturned in your lobbying efforts in opposition to abortion?

A Is it reasonable?

Q Yes. Is it?

A No, it is not.

Q Are you not involved in lobbying other than the lobbying you testified to earlier?

A No, I am not.

MR. LUCAS: No further questions.

MR. REYNOLDS: No questions.

JUDGE JULIAN: What countries do have limitations on elective abortion on minors?

THE WITNESS: Hungary, Czechoslovakia and Romania.

JUDGE JULIAN: Did they previously allow such procedures?

THE WITNESS: Yes, they did.

JUDGE JULIAN: Do you know whether these changes have come within the last three years?

THE WITNESS: Within the last few weeks.

JUDGE JULIAN: Is the source of your information with respect to those three countries official reports?

[35] THE WITNESS: No. Newspaper reports and reports in various medical journals.

JUDGE JULIAN: Reports in medical journals you have read?

THE WITNESS: Yes.

JUDGE JULIAN: Did the authorities state the reasons for the change of attitude in those three countries?

THE WITNESS: No, they didn't. They suggested but did not state it specifically.

JUDGE FREEDMAN: Doctor, I think you have answered this before, but I will put it to you anyway. Have you had specific occasions when it was your advice to parents that minors under 18 should be aborted for safety's sake?

THE WITNESS: No. We have told the parents that in our opinion and the opinion of the consultants we called upon that the continuation of the pregnancy did carry a certain risk, and it was left to the option of the minor and her parents then to make the decision.

JUDGE FREEDMAN: The occasion never arose where the pregnancy had developed to the point where you actually foresaw health factors that could create a real risk to the patient and then advised the mother or the father to consider an abortion?

THE WITNESS: No. We have not been faced with the necessity for medical reasons of advocating [36] abortion in any of these cases.

JUDGE ALDRICH: Doctor, in your opinion, when we are talking about a woman giving a valid consent, by which we mean an understanding consent, do you feel most females age 18 are capable of giving a valid consent?

THE WITNESS: Yes, sir. I think they have had sufficient experience to permit them to make a more appropriate judgment.

JUDGE ALDRICH: And you would say most of them do?

THE WITNESS: Yes.

JUDGE ALDRICH: But you would say at 17 most of them do not?

THE WITNESS: I think that there is —

JUDGE ALDRICH: In fact, that is what you did say.

THE WITNESS: Yes. I think there is a marked difference between young people in this particular age range in terms of their total experience.

JUDGE ALDRICH: Thank you.

MR. BEHAR: This witness may have to leave Massachusetts for commitments back home in Pennsylvania. Could he be excused if it is necessary for him to do so?

MR. LUCAS: No objection, Your Honor.

JUDGE ALDRICH: Yes. Thank you, Doctor.

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[37] RAYMOND C. YERKES (SWORN)
DIRECT EXAMINATION BY MR. BEHAR

Q Would you please state your name and address for the Court?

A Dr. Raymond C. Yerkes, 86 High Plain Road, Andover, Massachusetts.

Q What is your occupation?

A I am a child psychiatrist.

Q Are you licensed to practice medicine in Massachustts?

A I am.

Q What is your present position?

A My present position is Director of the Child Service at the Greater Lawrence Mental Health Center, and I am in half-time private practice.

Q How long have you been Director of the Child Service?

A I have been Director full-time of the children's services from June, 1971 until this fall and half-time from this fall until now.

Q Can you describe generally your duties and responsibilities as Director?

A Yes. Ours is a community mental health center, a first line treatment and services facility, providing services to 140,000 adults and a community of 25,000 young people. My duties encompass area-wide planning and coordination for child services of all ages, being a member of the administration of the clinic formulating policy and directing clinically my own particular unit [38] where I supervise three psychologists, three psychiatric social workers, two social work students and two guidance students in the delivery of services and, in addition, I treat children, adolescents and parents myself.

Q Could you briefly sketch for the Court your medical training?

A Yes. I graduated from Harvard Medical School in 1961 and had two years of postgraduate experience in internal medicine and pediatrics at Beth Israel Hospital, Boston.

From there I had two years of adult psychiatric training at the Massachusetts Mental Health Center, formerly the Boston Psychopathic Hospital, and two years of training in child psychiatry, working with children and parents in the Child Unit at the Massachusetts Mental Health Center.

Q In addition to your directorship of the facility in Lawrence, what other clinical experience have you had?

A I have had a rather wide range of clinical experience. From 1967 through 1971 I had a part-time or half-time private practice in Brookline. During the years 1967 to 1969

I was a staff psychiatrist and instructor at the Douglas A. Thom Clinic on Dartmouth Street in Boston, and I had a clinical instructorship in psychiatry at Boston University, and then in 1969 I was the head of one of three clinical units at the [39] James Jackson Putnam Children's Center in Roxbury, working with a wide range of minorities and a wide range of socio-economic groups.

I was also chief of community relations at the James Jackson Putnam Children's Center.

Q Doctor, I show you a three-page document. Would you identify that for the Court?

A This a a curriculum vitae I prepared myself.

MR. BEHAR: I offer this as an exhibit.

THE CLERK: Defendants' Exhibit E.

(Curriculum Vitae of Dr. Yerkes marked Defendants' Exhibit E.)

Q Doctor, have you been an active advocate of children's rights and programs and services for children and adolescents?

A This has been a primary concern of mine, particularly between the years 1968 through 1971 or 1972.

Q What was your involvement in this area?

A At that time, there were many important issues coming to bear in terms of legislation and implementation of services to children, not just mental health services, but many different orders of services to children in the Commonwealth.

I assisted in founding an advocacy organization of which I was a member of the Board of Directors for a number of years, and the particular issues that I addressed myself to and studied in depth were issues involving the new and developing concepts of special [40] education as they have now come into legislation.

Furthermore, I headed a task force regarding child neglect and child abuse to survey and support new legislation in that field.

Q You have indicated that you are a child psychiatrist. Is this a special discipline within psychiatry?

A Yes. Child psychiatry is a further discipline and a sub-specialty within adult psychiatry. In my own experience, it required two more years of further training with specialization really in both adolescents and younger children. It has come to have its own professional organization, outside of the adult psychiatric organization, such as the American Academy of Child Psychiatry, and a number of others involving child service clinics.

It has tended also to be a multi-discipline field. The child psychiatrist tends to work very closely with child psychologists, psychiatric social workers and psychiatric nurses.

Q Is there any reason for that evolution of this discipline within psychiatry?

A I think a very important reason. I think that there are certain aspects of child psychiatry that are significantly different from the general field of adult psychiatry. I think the major reason is that children and young people are rapidly developing and rapidly changing individuals, and from one year to [41] another or three years later you are working with an entirely different individual.

I think the backbone of child psychiatry is understanding child development — emotional, physical and mental.

Q About how many cases of children and adolescents have you encountered in your professional career?

A Oh, doing a calculated estimate, I would say over the last seven and a half years of actual practice and four years of training, I would estimate that I have been involved in some 2,000 children, and in most cases their parents along with the

children and adolescents, and I would guess of that between the ages of 12 or 13 and 18, I would guess somewhere in the area of about 800.

JUDGE JULIAN: How many?

THE WITNESS: About 800, sir.

Q Can you generalize as to the range of problems you have encountered in the course of your professional experience in children and adolescents?

A Yes. I believe I have covered a very wide range of problems, not only in terms of psycho-pathological problems or normal development problems, but a wide range of majority and minority groups, Blacks, Spanish-speaking or whatever, and including my private practice and public work, I think I have had a fair representation of cross socio-economic problems.

[42] In addition, the work we do at our center again is a first-line service provider. Often people come directly to us, not referred.

We also work with a network of agencies in the community, children's protective services, family service agencies, our four school systems, both in consultation and work with patients, services in child placement, such as the Division of Family and Children Services at the Welfare Department, and so we work with a wide variety of organizations.

Q Doctor, do you routinely keep up with the medical literature regarding child and adolescent psychological problems?

A Yes, I do. I routinely keep up with it and I attend conferences and conventions.

Q In the course of your practice, have you encountered situations involving pregnancy?

A Yes, I have.

Q In what context have these situations arisen?

A I think that I have probably seen about as many context of pregnancy as possible in terms of being a general community type child psychiatrist. I have seen situations — very frequently the most common are pregnancies and I see the effects upon the family and the other children, and I have seen pregnancies in older married women or unmarried or divorced women which were unwanted pregnancies. I have seen unwanted [43] pregnancies in young women and in adolescents.

Q Did you have occasion to do evaluations, psychiatric evaluations under the old law in Massachusetts?

A Yes. As part of my private practice, prior to the Supreme Court decision involving abortion, on referrals from a number of gynecologists and obstetricians in the Boston area, I performed psychiatric evaluations to provide a consultation and recommendation to those gynecologists and their hospital committees, involving therapeutic interruption of pregnancy.

JUDGE ALDRICH: Are you talking simply about minors?

THE WITNESS: Both minors and mature women.

Q Can you estimate regarding the number of evaluations you did under the old law — can you estimate the percentage of cases in which you recommended abortions?

A Yes. I would estimate, and I think very accurately, it at 90% where I recommended for abortion.

Q Doctor, are there recognized psychological growth goals that take place in adolescence?

A Yes. Adolescence is a particular period of development often divided into two phases, but I think as a phase of development it is that phase which is between childhood marked often by the beginning of puberty and ending with that individual being primarily independent and on their own economically or in terms of their living arrangement, roughly I would say ages [44] 13 through 18. In this period of time there is a struggle to really actualize themselves in terms of becoming a part of the on-going adult world.

In this period it is marked by a high sensitivity to values, a highly discriminating sense of values. It is marked by contrasts. On one day the individual is showing immense maturity. One sees the child underneath with impulsive behavior or changes in terms of their managing feelings.

I think one of the primary problems in adolescence is that of learning how to make wise decisions.

JUDGE JULIAN: Learning how to do what?

THE WITNESS: How to make a wise decision, a decision involving implications of things, not just things on the face of it.

The goals of adolescents articulated by a number of people is that of becoming actually independent, actually autonomous.

Another goal is having a sense of self separate from the family, but also alongside that family.

And the final commonly termed goal of adolescents or developmental task is that of solidifying a gender identity, identity as a man or a woman.

These are processes that take a set period of time. Some emerge sooner into maturity than others. I think that young people vary widely within this period [45] of time.

Q Doctor, based upon your education, training and experience and studies of the literature, do you have an opinion as to what the impact of pregnancy is upon an adolescent given the growth goals you have described?

JUDGE ALDRICH: Adolescent what?

MR. BEHAR: I will ask it again.

JUDGE ALDRICH: I got everything except the last five words.

MR. BEHAR: Given the growth goals you have described.

A Yes. I think that pregnancy, and I am speaking of pregnancy whether in a single or married adolescent, is an immensely important happening. For an unmarried adolescent living with her family, pregnancy has a degree of impact that I would term a developmental crisis. This is a developmental crisis in the middle of these on-going tasks I have described that must be accomplished for maturity in adolescents, and whether it is for better or worse, the appearance of pregnancy is a major disruption of these developmental efforts.

Q Is this a psychological crisis for an adolescent?

A This is very definitely a psychological crisis similar to other kinds of crises the adolescent experiences with one very significant difference. This is a crisis that involves the sense of femininity, the sense of growing sexuality, and I think this is what [46] makes it quite unique.

Q In your experience, are there other situations which involve adolescents in decision making within a psychological crisis context?

A Yes, there are both positive and negative, good and troublesome. For instance, an adolescent changing to another school that they like better. This is a decision which has to be made and weighed carefully. There are troublesome crises, such as dropping out of school or difficulties in flunking out of school. There are crises of death or loss of peers which has a tremendous impact on the peer group in adolescents.

There are the life crises, such as the loss of a parent which can deeply affect the adolescent.

Q Doctor, based upon your education, training and experience and studies of the medical literature, do you have an opinion as to what constitutes good medical practice and mental health practice regarding the resolution of such a psychological crisis as pregnancy?

A Yes, I do.

Q What is your opinion?

A I am of the opinion that an unwanted pregnancy occurring in an adolescent has a very strong impact on the emotional and developmental aspects of that adolescent. This

is an extremely weighty decision, one which falls upon the shoulders of a not yet fully [47] mature individual.

Q And regarding the resolution of this particular crisis, regardless of how it is resolved, what is your opinion as to what constitutes good medical practice and good mental health practice in the resolution regardless of the decision made?

A I think the professional has a very important role here. The adolescent who is pregnant tends to be quite frightened and scared and feels impelled for an immediate solution to the problem. I think the professional has the responsibility to first have an open mind about this matter and say that there are many options to this situation and to carefully and deliberately set the stage for the individual who is pregnant and those important people around that person with all due deliberation to arrive at a solution which is fit with their particular situation.

One must, as a professional, tread the fine line of just being pushed along by the tide of feeling for an impulsive solution versus dragging one's feet and dragging it out so long that it makes things difficult.

I would say that no less than a week of deliberation on this in a very intensive way is necessary and the result should be that that individual ends up feeling that they have made the best possible decision of decisions and that they have done their best no matter what.

[48] JUDGE FREEDMAN: Do you mean by that if a week goes by and a decision has not been reached as to what to do with this unwanted pregnancy, it could create psychological havoc with the patient?

THE WITNESS: Well, I think I choose the week not so much out of a psychological time frame, but often the situation is that it is nearing the third month of pregnancy. I would say that at a minimum something like a week should be

taken. I don't feel that an overnight decision or over a couple of days allows them to sort out the feeling or the feeling-dust to settle around the decision.

There is often very much trouble during this time, a lot of strife and concern. Strife and concern does not mean that the individual is badly off. It may mean that they are getting these things worked out so that they are sitting on a lot of feelings later that they have just pushed down in a kind of impulsive situation.

JUDGE FREEDMAN: Your concerns are related to the psychological development?

THE WITNESS: Yes, very definitely the psychological development, the psychological resolution of these issues.

Q Doctor, you mentioned that people are important to the adolescent. What did you have in mind there?

A The adolescent depending upon age lives in two [49] worlds. One is a world of peers and one is a world of family. In terms of emotionally important people, the family are the oldest. They know the individual the best. They are the people I think should be primarily involved, if at all possible. I feel that the family involvement should be the rule for several reasons.

Q What are those reasons?

A The first reason is that an unwanted pregnancy involves an emotional crisis of at least a month to six weeks duration. There is a waiting decision to be made by the adolescent. Though the adolescent in certain ways may be clear upon what decision would be best for her, I think that on the one hand it puts an undue emotional strain, the strain of responsibility upon that individual to make a decision alone. I think having the family involved and the family and that individual working through a decision together that the teenager feels as though they have support in their decision, and that they have come and arrived at the best decision possible.

I think that without the family being involved, the family is not prepared to support that individual through the crisis of three to six weeks following a therapeutic interruption of pregnancy, and there is the most important matter of making one's peace with the decision that has been made.

[50] I have had certain experience, a couple of cases of the family finding out later and feelings coming out, "Well, you made that decision. You live with it."

Where you have the family making the decision, everyone is committed to carrying out that decision ultimately.

Q Are you saying that one has to take a long-term view?

A I think one has to very importantly take a long-term view. Often what I hear are short-term views, but the long-term view is that of helping this individual come out of a crisis with a minimum amount of impairment emotionally in terms of any subsequent pregnancies at a later time when she is prepared to have babies.

Q Doctor, based upon your education, training, experience and your studies of the medical literature, do you have an opinion what constitutes an informed consent to a procedure such as abortion?

A For an adolescent?

Q For an adolescent under 18. Do you have an opinion?

A I have an opinion.

Q What is that opinion?

A That opinion is that the informed consent must not only entail an understanding technically of the procedure and technically of the risks and physical complications, but it must entail a capability of life experience sufficient to grasp the implications of such [51] a procedure, particularly in regard to the emotional implications — that the feelings involved with terminating a pregnancy do not end with the termination of the pregnancy but go on after a period of time, and these must be faced and dealt with.

Q Doctor, based upon your education, training, experience and studies of the literature, do you have an opinion as to whether there is a correlation between the age of an adolescent and the ability of that adolescent to give an informed consent as described?

A Yes, I do.

Q What is that opinion?

A As one sees increasing maturity during the phase of adolescence, I think that what I have seen is the 13 to 15 year age group tend to not want to be primary in the decision making. They would rather have a decision made for them. I think in that group one has to work to help the child participate in the decision making and not just leave it up to the parents.

In the 16 to 18 year group, I have the feeling that they would like to have greater input into the decision making, but I think they have difficulty, with individual exceptions obviously, but as a rule and as a class I think that they have difficulty in both arriving at the final decision and carrying it through with an understanding of all the implications.

Q Doctor, based upon your education, training, experience [52] and studies of the medical literature, do you have an opinion whether 16 year olds as a class can give an informed consent to a procedure such as abortion within your definition?

A Within my definition of understanding the facts and being able to understand the implications as a rule and as a class I do not think the 16 and 17 year old group are capable of giving an informed consent.

Q Do you recognize exceptions to that?

A Yes.

JUDGE ALDRICH: Do you draw a marked distinction with age 18?

THE WITNESS: I think age 18 is partly a societal mile post in certain ways. That is the age at which the kids are

graduating from high school and go to college, and that is the age that the kids not going to college often move out into their own apartments. It is the difference between contemplating all these responsibilities and suddenly arriving, that they are there and they are responsible for their own lives, and I think this puts a different perspective on things.

One sees this in the last four months of the senior year treating high school seniors. There is an anxiety that they go through in facing that mile post.

Q Doctor, in your experience have you found reluctance [53] in adolescents under 18 to involve their parents in psychological crisis situations?

A Yes. I think it varies. Again, it is individual. The reluctance that I often see in adolescents having some sort of crisis, especially if it is something where they are worried about trouble, there is the tendency to overestimate the response on the part of the parents to their crisis.

My common experience is that in the very serious situations, for example, an unwanted pregnancy, that very often after a bit of flack the families come through and say, "Hey, let's help. Let's do it all together."

Q So your experience has been also in situations where the parents have been notified?

A Yes. Well, in most situations I am notified. In fact, I don't know of any that I haven't. Yes, the parents come through and I think it is an important thing on their part in relationship to their child.

MR. BEHAR: I have no further questions of this witness.

JUDGE FREEDMAN: Are you saying, Doctor, by your last statement that you have only dealt with adolescents where the parents have been notified of the problem of the unwanted pregnancy?

THE WITNESS: Yes, partly out of a personal policy of mine.

[54] JUDGE FREEDMAN: You have never dealt with the adolescent as a patient by herself?

THE WITNESS: In terms of any therapeutic interruption of pregnancy. In terms of other situations, such as treatment at our center, we may with the over 16 law deal with an adolescent individually without the family for an evaluative period. However, after a period of evaluation, we ordinarily insist, even if the family will not participate, that they know and support the treatment of that individual at our center.

MR. REYNOLDS: I have no questions.

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CROSS-EXAMINATION BY MR. LUCAS

Q Is there any form of certification in the psychiatric field for dealing with adolescent pregnancy? I notice that you are certified in adult psychiatry.

A Yes. General psychiatry is the accurate term. The certification in psychiatry is of two kinds. The first is general psychiatry, and as child psychiatry evolved there was a separate sub-specialty in terms of child psychiatry. I am certified in general psychiatry. I am board qualified in child psychiatry. It is a matter of taking the examinations.

Q Do you have to still take both written and oral examinations to obtain that certification?

A Yes, you do. However, may I say it is not uncommon for a child psychiatrist not to be certified. It is not like a licensure or a bar exam. It has nothing to do with that.

Q Did I correctly understand that you in your clinical experience have dealt with approximately 800 patients under age 18?

A Yes.

Q Approximately how many of those patients were pregnant?

A I would say directly and supervisorily it would run in the range of two dozen to 30 personally. One experience I have had is three in-depth studied cases in on-going treatment who during the course of treatment experienced a pregnancy.

Q Do you know how many minors under age 18 were pregnant during the past year in Massachusetts?

A Would you repeat that?

Q Do you know how many pregnant minors there were in Massachusetts under age 18 in the past year?

A I have an impression, but I have no direct knowledge.

Q What range would be your estimate? Do you have an estimate?

MR. BEHAR: I object.

JUDGE ALDRICH: The matter will be material at some point. But if the witness does not know, he certainly doesn't have to guess.

A I know it is increasing, but that is the only impression that I have.

Q Over how many years was your experience with these 800 [56] patients under age 18?

A Well, beginning in my training, I began my adolescent experience on the in-patient service during my adult training and continued many of the cases. I have one adolescent case that I have treated off and on for the last eight years. I would say probably over 12 years.

Q And these 30 pregnancy cases that you dealt with, were these also spread out over that 12-year period?

A Yes, they were.

Q So this would be about one every two years?

A Well, it might be an average, but it does not describe the distribution. I would say that most have been over the last four years.

Q Have you written any articles at all on the subject of adolescent pregnancy?

A No, I have not.

Q Have you conducted any formal studies of adolescent pregnancy?

A No, I have not.

Q Are the types of services that you offer available to all minors in the Commonwealth of Massachusetts?

A Would you repeat that?

Q Are the types of services that you offer available to all minors in the Commonwealth of Massachusetts or do you see them as private patients primarily?

A Do you mean my private practice and clinical practice are particularly in the mental health region? I don't understand.

[57] Q Based upon your experience in this State, to what extent is psychiatric treatment or psychiatric consultation available for pregnant minors in the Commonwealth?

A They are available in our area, I can tell you, both privately and in the clinic.

Q Are they readily available for all minors in the Commonwealth?

A I don't think I am qualified to answer that.

Q Are you a member of the American Psychiatric Association?

A Yes, I am.

Q Do they have a position on adolescent pregnancy?

A They have a position on pregnancy.

Q What is their position on abortion?

A Let's see. It was last spring or summer when I read it. I could only summarize, but it is generally that it is a situation of decision making between patient and doctor.

Q They do not include parents in that statement, do they?

MR. BEHAR: Objection.

JUDGE ALDRICH: He may answer if he knows. He is a member of the Society.

A I don't know. However, I do know that the American Psychiatric Association primarily addresses itself to adult psychiatry.

Q Have they addressed themselves to the problem of [58] adolescent pregnancy at all?

A I read the statement thoroughly and I don't know whether they do. My impression is that they do not.

Q Do you find that minors at a given age vary widely in degrees of maturity?

JUDGE ALDRICH: Would you speak up?

Q Do you find that minors at a given age vary widely in degrees of maturity?

A By minors, do you mean adolescent minors?

Q Yes, under 18.

A Yes, and they tend to vary from day to day, too, in terms of the level of maturity they are operating on.

Q As a class, do you regard married minors as any more competent emotionally than unmarried minors capable of giving an informed consent?

A In that marriage and the way most families deal with married minors, they have the responsibility on their shoulders, and I think they tend to rise to the occasion and can give an informed consent probably more often, but I don't think that one could make that a rule in each case.

Q Do you think unmarried minors rise to the responsibility when they become pregnant of making their life decisions?

A Some of them.

Q Do you think minors under age 18 as a class are capable of giving an informed consent for the treatment of [59] V.D.?

A Yes, I would say so. I think it is a different matter. It is a different problem from pregnancy.

Q In what way is V.D. a different problem from pregnancy?

A I don't know of veneral disease as being a normal psycho-sexual development in pregnancy.

Q Isn't it a frequent part of the psycho-sexual development?

A Not in the terms of the way the psycho-sexual development is a frequent happening in sexual relations. It is not a counterpart psychologically in normal development.

Q Have you had the occasion to be consulted by any pregnant minors since last November?

A No.

Q Have you ever had a case of a pregnant minor who was discussing the subject of abortion with you who objected to your notifying her parents?

A I think we have to consider the two roles I operate in:

(1) One role was as a therapist and in an on-going treatment situation where an individual became pregnant;

(2) And another role is having to sit in judgment as to whether under the old law, whether an individual should have therapeutic interruption of pregnancy.

Those two roles don't mix. In the first role, as a therapist, it was more in an advise-and- [60] consent role; and in each and every case, working the matter through, the adolescents themselves consulted the parents. They were worried about it and they thought terrible things would happen, and in all cases terrible things didn't happen. The parents were supportive.

In the other role of making a decision in regard to pregnancy and the interruption of a pregnancy, under the old system prior to this Supreme Court decision, it was required that the parents were involved before they came to me.

Q Of the 30 pregnant adolescents that you had seen, how many of those have you seen since the Supreme Court decision on abortion?

A I have seen one subsequent who came to me subsequent to the abortion.

I have not seen or supervised, I don't believe, any since November.

Q How many have you seen since January of '73?

A January of '73?

Q Is that the date you meant?

A Yes. I would guess probably a dozen or 14.

Q How many of those were seeking, were considering the option of an abortion?

A I would consider — I would guess probably half, somewhere in there. These are fine statistics that I would be afraid I would have to sit down and really calculate up.

[61] Q How do those patients get to you in the first place?

A In terms of most of the experience since '73, it has been through my clinical work since I was fulltime, and on referral from the local drug council, which does a lot of work with teenagers other than with drugs, school guidance counselors and on certain occasions from the families themselves.

Q Of the ones that you have seen since January, '73, I believe you thought you had seen about 14 and about half of those were considering an abortion.

A Yes.

Q What was the outcome of the pregnancies of those half?

A I think about half — maybe 40% of them obtained abortions and we followed through with services subsequent to the abortion.

Q Do you know what became of the other 60%?

A I would say in terms of our follow-up people sticking with us, I would say the other 60% probably had their babies. I think in two cases there was a spontaneous abortion. And the most, there were some married and some — one or two gave up the infant, and I think two of them stayed with their families and bringing up their child.

Q Do you think that 17 year olds as a class are capable of understanding the impact on their future of continuing pregnancy?

A I think they have limitations there, too, and I think [62] they need help in making decisions about having an abortion; they need more help in considering the implications for the future. I think I have seen —

JUDGE ALDRICH: Need more help for which, continuing the pregnancy or abortion?

THE WITNESS: More help in terms of pregnancy, if they are going to keep the child, because it involves an on-going strain of raising that infant.

Q Do you say that continuing the pregnancy is more of a disruption of their life than obtaining an abortion?

A No, I did not. I said that they need more help because there is not an infant that's a product of an abortion, and there is in a term pregnancy.

Q Do you think that in that case, the case of continuing the pregnancy, is, generally speaking, more of a disruption of a minor's life than obtaining an abortion?

A I don't think I could answer that on the basis of what do you mean by "disruption"? Whether emotional disruption or literal disruption — taking out nine months or sometimes having a problem with education and all the other things that come up.

Q Well, it is a disruption in some ways that an abortion is not?

A In terms of time and energy consummed, yes.

Q In terms of emotional impact on the minor in the future?

A I think that is purely individual. I think there are some minors who would be much more disrupted by an [63] abortion and others more disrupted by a pregnancy, and I think it depends upon their condition in the situation largely.

Q Do you think the ability of the 17 year old to give an informed consent to an abortion is purely an individual matter?

A I don't know what you are asking. Are you speaking of a class or —

Q Well, I am asking if the question of whether a minor is competent, whether a minor under 18 is competent to consent to an abortion, whether that is an individual question that varies from minor to minor?

A Yes, they are all individual questions; but I think there are generalizations that can be made around the class.

Q Do you think as many as 40% of 17 year olds are capable of giving an informed consent to an abortion?

A I don't think I am qualified to say on that. I would say some are and the majority are not, and I think it would take some study to do that.

Q How large would you think that majority is?

MR. REYNOLDS: I object to that, if Your Honor please.

JUDGE ALDRICH: He doesn't know, so I don't know why we are going to guess.

Q Do you think it sound medical practice to require the consent of both parents invariably with the minor under [64] 18 seeking an abortion?

A I think as a rule and as a precedent to be striven for, yes.

Q Do you require the consent regardless of the reasons the parents give for it?

JUDGE ALDRICH: Regardless of the reasons that the parents give for withholding the consent?

MR. REYNOLDS: I object to that, if Your Honor please.

JUDGE ALDRICH: I don't think he can answer that. If he can, I would like to hear it.

THE WITNESS: There are other remedies to the situation. I think as a general rule that the requirement of both parents consenting is a sound one in terms of a mental health practice of getting everybody involved to have a bit of the action and the responsibility to commit themselves right from the start.

JUDGE ALDRICH: I think that is a responsive answer.

Q Do you ever encounter instances where the parent — one parent at least — refuses to consent to an abortion?

A Yes, as I have encountered instances in terms of surgery when I was in pediatrics or in blood transfusions.

Q And what reasons do the parents give for refusing consent in such cases?

A Very often it is a value judgment that they do not feel an abortion is morally right. Very often in the [65] situation in the individual raised in that family, even though there may be differing in certain ways, she has that also in her value system.

Q Are there any other reasons that a parent gives for withholding consent?

A I would say that there are certain reasons involving physical health or concerns about emotional health.

Q What percentage of parents in those cases are gynecologists or psychiatrists?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q Do you think that emotional support can be provided for a pregnant minor without requiring parental consent?

A Yes.

Q Under what circumstances do you recommend an abortion for a person under 18 from an emotional standpoint?

A Well, these days I don't have to recommend; that's a gynecological decision and I am sometimes in the position of consulting and I try to elicit as thoroughly as possible the

feelings about all alternatives, the feelings of the child toward the pregnancy and thoughts of the infant, and try to help them to come to some resolute decision involving it.

JUDGE ALDRICH: Do you mean by that answer, Doctor, you don't recommend either way?

THE WITNESS: Don't recommend?

[66] JUDGE ALDRICH: Either way. He asked you —

THE WITNESS: Yes, as a rule, when I am consulted at this point, where psychiatric consultation is not part of the decision making, I usually do not take a stance with the patient. I may firm up a stance that they have worked through and say, "Well, that seems to make sense to me"; but I do not take a stance with the patient.

JUDGE FREEDMAN: I thought you answered in direct examination in a question from Mr. Behar that in 90% of the cases psychologically evaluated —

THE WITNESS: Both —

JUDGE FREEDMAN: Both minors and majors, in 90% of those cases, you recommend an abortion. Did you say that?

THE WITNESS: Yes.

I try to keep sorted out my role as a decision maker under the old statute prior to the Supreme Court decision regarding abortion. In that case, one of my roles was to operate giving a recommendation to a gynecologist and a hospital committee. In those cases, where I had to sit in judgment in essence on whether an abortion should be recommended as a medical and psychiatric decision, yes, I did recommend 90% of the cases for therapeutic interruption of pregnancy.

However, since the liberalization of the abortion statutes, my role has not had to be involved [67] in making medical recommendations, but more as working along with the gynecologist or working along with the family and the patients to help them carry out what was best for them.

JUDGE FREEDMAN: In your history of having dealt with two dozen or 30 patients who were adolescents —

THE WITNESS: Yes.

JUDGE FREEDMAN: — did you, as a result of your evaluation psychologically establish a position where you then recommended an abortion in any of those cases?

THE WITNESS: Those in the last four — well, last three years actually — those have been primarily clinical cases. And we again took a therapeutic stance of having or helping the family to come to some resolution. We felt our role was helping them resolve rather than taking an authoritative position or authoritarian position. And as they did all different things, they made different decisions.

Q Do you regard gynecologists as capable of assuming this recommending role?

A In what context?

Q In the context that they are in fact doing it now. Do you feel gynecologists are capable and competent?

A On a medical basis or a medical — psychological —

MR. REYNOLDS: I object.

JUDGE ALDRICH: I will exclude that question. [68] It assumes something and we don't know what it is.

Q You did testify gynecologists were assuming the recommending role which had previously been assumed by psychiatrists for abortions, did you not?

MR. BEHAR: Objection.

JUDGE ALDRICH: I don't myself remember that testimony.

Did you so testify, Doctor?

THE WITNESS: Not to my recall. I may have said —

JUDGE ALDRICH: Well, let's start over again. What is the role of the gynecologist? That's my question.

THE WITNESS: Yes, I didn't know whether you were talking to me.

JUDGE ALDRICH: I was asking you.

THE WITNESS: Well, what is the role of the gynecologist?

JUDGE ALDRICH: Yes.

THE WITNESS: The gynecologist is the individual who has to perform the procedure if the decision is made. Now, I am not a gynecologist. However, I think a comparable medical situation is that a gynecologist has the same responsibility to ensure that there is sensible deliberation on this matter of the patient and the family. And I think in certain cases I would go to general medical ethics that if there were differences [69] between the patient — that is the adolescent patient and her family — that the gynecologist might weigh in the decision and might attempt to either persuade the family or to disuade a patient if he felt there were a medical indication for it.

But I think they should help them make the decision the best that they can.

Q And in what percentage of cases of a large cross segment of pregnant minors under 18 do you think that an abortion is the better and preferred course?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I don't know if he can answer that question.

THE WITNESS: I can't.

JUDGE ALDRICH: I wouldn't think so.

Q Do you think it depends upon the individual circumstances of the patient?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: You may answer that.

A I think it depends upon the individual circumstances of the patient and the family and the particular situation in life.

Q I believe you testified earlier that you thought one week of deliberation was necessary for a patient seeking an abortion. Is that correct?

A Well, considering making it in my experience and [70] again, as I have said, at that time, that's not a psychologically determined time frame. In my experience, the matter of one getting together and talking and deliberating on this, that is usually takes about a week to come to some sort of resolution. It is a product of my experience and not any theoretical time frame.

Q Do you think this week ought to take place after a pregnancy is definitely diagnosed?

A It would be hard before. You mean before — when there is a concern about whether the girl is pregnant or not?

JUDGE ALDRICH: Well, what about consent before a girl is pregnant?

THE WITNESS: Where she has missed a period and —

JUDGE ALDRICH: Let's assume she is still chaste — that's an old-fashioned word.

THE WITNESS: Yes, I know it. I assume it is her missing a period which is getting the cause — yes, I think that part of that could be worked through beforehand, but I think when the facts come in, there is very different treatment of the issue by the individual and by her family.

MR. LUCAS: I don't think I have any further questions.

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[71] RE-DIRECT EXAMINATION BY MR. BEHAR

Q I just have one on re-direct. You indicated that in some situations emotional support can be available to an adolescent besides her parents. What sources of support did you have in mind?

A I think that in my thinking, I think in really a sub-class of adolescents, which I think is a minority — the major class, I believe, are adolescents who are more or less functioning in intact families — I think there is a sub-class of teenagers for whom the families either are not filling their role or for whom they already left their families. And I think in this situation medical and mental health professionals have a certain responsibility to perform an emotionally supportive role.

I think, also, in certain cases such as the courts may come into this situation is where there is a disagreement between the child and the parent, and the child is really bearing their responsibility rather well, to utilize court sources.

Q So you are saying they need a responsible adult?

A Not solely because individuals can't make up their mind, but give them company in that very lonely decision-making time and to follow through with them in support until they are over this crisis, yes.

MR. BEHAR: I have no further questions.

JUDGE ALDRICH: Perhaps you have already [72] answered this in the last minute or so, but you testified about the strain that's on the child that has to make a decision alone. And then you spoke later about the child who had parents who regarded abortion to be morally impermissible under any circumstances.

THE WITNESS: Yes.

JUDGE ALDRICH: And, obviously, there are such people with great sincerity. What is the strain that's on the child who has those parents?

THE WITNESS: The parents who feel that abortion is both emotionally and ethically abhorrent?

JUDGE ALDRICH: Not morally permissible.

THE WITNESS: I think a dual strain, one strain may be her own personally felt beliefs, but also —

JUDGE ALDRICH: I would like to assume she didn't have such beliefs, because that's, I would guess, possible, in fact very possible.

THE WITNESS: That she believes differently than her parents?

JUDGE ALDRICH: Yes.

THE WITNESS: Okay. She believes differently than her parents. Very often this sets up an internal conflict with the early childhood conscience being programmed for abhorrent feelings about abortion.

JUDGE ALDRICH: No doubt a great guilt feeling on herself?

[73] THE WITNESS: Yes, and I think — and I don't want to get into conscious and unconscious issues — but I think that even though her manifest belief in adolescence, and it may be an illogical one or thought through belief — may be that the young woman should have an abortion available. I think there is a potential for unconscious guilt here, Your Honor, which is much stronger, say, in a child who grows up in a family that always felt this.

JUDGE ALDRICH: What is the solution for that?

THE WITNESS: I don't think there is a solution, but I think that professionally we can ensure a better working through of those feelings at the time.

JUDGE ALDRICH: With the parent?

THE WITNESS: With the parent or individually with the child.

I am thinking of one individual in particular who it happened with who had a very strong post-abortion reaction for which I treated her, who ended up saying, "You know, I just feel bad and I don't know why. But I know I did the right thing."

So that she was equally as resolved about the decision but still she, I think, had a lot of feelings about it more than another person might.

JUDGE ALDRICH: Thank you.

Do you have any more witnesses, Mr. Behar?

MR. BEHAR: Could we take the morning recess? [74] I want to make a decision as to that.

JUDGE ALDRICH: Yes, surely, not very long.

(Morning recess)

MR. BEHAR: The defendants would have no further evidence to present.

JUDGE ALDRICH: Well, we will be glad to hear arguments.

MR. REYNOLDS: I think my brother was speaking for himself. I have one short witness, if I may.

MR. LUCAS: This is the first we have heard of any further witness, and we have been repeatedly inquiring about witnesses. We would object to any witness we have no notice of.

We don't know the witness' identification —

MR. REYNOLDS: I didn't know any inquiry was made.

MR. RILEY: Your Honor, a telephone inquiry was made about any expert witnesses that were going to be called and actually it was a request for a curriculum vitae of any expert witness that would be called. We are not going to call an expert witness. We are calling one of the parent intervenors in the case.

JUDGE ALDRICH: What is the purpose of this testimony? What do you propose to show?

MR. REYNOLDS: I have a witness today, one of the parent intervenors, who is the parent of a [75] teenage child, unmarried, of childbearing age, and I want to have her testify as to the reasons that she would support the unholding of the statute in question.

MR. LUCAS: We will withdraw our objection. I thought it was an expert witness.

JUDGE ALDRICH: All right, proceed.

MR. REYNOLDS: Thank you very much. I would like to call Mrs. Hunerwadel.

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JEAN HUNERWADEL (SWORN)
DIRECT EXAMINATION BY MR. REYNOLDS

Q Will you give us your full name, please?
A My name is Jean Hunerwadel.
Q Now, where do you live, Mrs. Hunerwadel?
A 121 Gardner Street, Hingham.
Q You are married, are you?
A Yes.
Q What is your husband's name?
A His name is Jean L.
Q And you have children, do you?
A Yes, we do.
Q May we have their ages?
A Thirteen, 12 and 9 years.
Q With regard to yourself, Mrs. Hunerwadel, will you tell us what your education is?
A I have a B.S. degree in early childhood education and child development from St. Joseph's College in West Hartford, Connecticut.
Q When did you recieve that?
A 1953.
Q Since that time, outside of the home, what has been your work experience, if any?

A I worked four years at the James Jackson Putnam Children's Center Clinic for emotionally disturbed pre-school children and then, following that, I worked one year as kindergarten teacher at Shady Hill School in Cambridge. I was married following that and then did not work outside the home again until 1970 when I was director of St. John's Community Nursery School in Hingham for two years.

Q Are you affiliated with any of the Pro Life organizations?

A Yes, I am. I am an incorporating member of the Birth Right of South Shore in which I am no longer active, and I am subscribing member to the Massachusetts Citizens For Life from which I receive a news letter once a month.

Q Mrs. Hunerwadel, do you have any personal views on the subject of abortion?

Q Yes, I do.

Q Will you be good enough to tell us what that view is?

A We would regard abortion to be the least desirable alternative to an unplanned pregnancy.

Q Are you familiar with the provisions of Chapter 112, § 12P?

[77] A Yes, I am, generally familiar.

Q Now, I ask you this, Mrs. Hunerwadel, are there circumstances in which you would consent to an abortion to be performed on one of your daughters were she to be found to be pregnant, unmarried and under age 18?

A Yes, there are.

Q Tell us what those circumstances would be.

A We would like to understand the circumstances which led to her pregnancy, the circumstances in her life. We would like to know about the boy by whom she became pregnant, about her feelings about the pregnancy, her feelings about the baby, her feelings about the boy who would be the father of the child. We would like to be able to make available to her our support and our interest and our care as we have from the time that we have known she was coming to us.

We would like to be sure that she has available all of the alternatives that are available to her and all of the resources in the community, and we would like the opportunity to have her know that we will continue to support her, and if she should decide, in spite of what we were able to show to her in terms of alternatives and support and how we felt, that she just must have an abortion, we would consent to that; but that would not be the end of our involvement.

We would also want to be sure that she had a gynecologist-obstetrician whom we felt was professionally [78] skilled, and beyond that, who had the qualities of interest and sensitivity and humanitarianism which we regard to be important in physicians; and we would also want to be sure that the facility that was chosen in which the abortion were to be done was one which had adequate services all around, because we do not regard the situation of unplanned pregnancy to be a separate situation which is begun, ended and then is out of the youngster's life.

We feel that the youngster, as everybody does, brings feelings of circumstances into the situation and that also circumstances and feelings continue after, whether it is a completed pregnancy or an abortion.

And we would foresee needing follow-up care for this youngster, psychiatrically, probably, at some time if not immediately.

So those kinds of decisions would be very important to us to help her to make.

Q Mrs. Hunerwadel, you are yourself, of course, a former teenager and you have teenage children. In your view, do you consider that young woman under the age of 18 are capable of informed consent with regard to the option of an abortion?

JUDGE ALDRICH: It seems to me we weren't going to have any expert opinion.

MR. REYNOLDS: I wasn't considering it from the standpoint of an expert.

[79] JUDGE ALDRICH: How are we going to be affected by one lady — surely sincere and truthful — but we might as well have one hundred thousand ladies and get their views, if this is your idea of trying the case.

MR. REYNOLDS: Then I would not press the question, Your Honor.

Thank you, Mrs. Hunerwadel.

MR. LUCAS: Could we put cross-examination off to the afternoon session and give me an opportunity to consult?

JUDGE ALDRICH: The fact of the matter is we were going to ask for oral argument forthwith.

MR. LUCAS: We would like to request the Court to have cross-examination. — I think it would be very brief — immediately after lunch.

JUDGE ALDRICH: Well, I suppose we can go to lunch early.

How long is your oral argument going to take?

MR. LUCAS: Approximately 40 minutes would be adequate.

JUDGE FREEDMAN: You don't have any rebuttal witnesses, do you?

MR. LUCAS: No, Your Honor.

JUDGE ALDRICH: Do you plan to file a brief?

MR. LUCAS: We decided not to file a further brief beyond the memorandum and authorities we have [80] submitted.

We have an additional decision from the Supreme Court of the State of Washington, and I have provided counsel from the other side with it.

JUDGE ALDRICH: Very well, you can give that to the Clerk.

How about the argument by you other gentlemen?

MR. BEHAR: I would estimate 20 minutes. I think we have said it in our brief.

MR. REYNOLDS: Mr. Riley, with the Court's permission, is going to give our argument.

JUDGE FREEDMAN: How long do you estimate?

MR. RILEY: Fifteen to 20 minutes, Your Honor.

JUDGE ALDRICH: We can take a recess until 1:30.

(Recess.)

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(AFTERNOON SESSION:)
(1:30 P.M.)

MR. REYNOLDS: I don't know whether Mr. Lucas has decided to cross-examine my witness or not.

MR. LUCAS: Yes, we are ready to go forward with cross-examination.

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CROSS-EXAMINATION BY MR. LUCAS

Q Mrs. Hunerwadel, what is your middle name?

A My middle name?

Q Yes.

A Well, my middle name is Jane if you call me Mary Jane, or my middle name is Maroney if you call me Mary Jane Maroney, or if you call me Jane Maroney Hunerwadel. I sign it both ways.

Q I noticed on the Complaint filed by the intervenors your name is mispelled as was that of four other plaintiffs. Had you ever met with counsel in this case before the lawsuit was filed?

A Before the lawsuit was filed?

Q Before the lawsuit on behalf of you and the other intervenors?

A I had talked with counsel. How is my name spelled?

Q It has a "d" in it.

A Yes, it does have a "d" in it.

Q It does have a "d" in it?

A That is appropriate.

[82] Q I see.

A As long as it is in the right place.

Q There was a letter to the Court changing the spelling of it.

JUDGE FREEDMAN: Has it been corrected?

MR. LUCAS: It seems to be corrected on the face of the Complaint, but the letter of January 23 to the Court is attempting to change it to an incorrect spelling along with that of four others.

Q When did you first hear about this lawsuit, that it was pending?

A It is hard for me to remember just exactly when. I can't remember whether I learned of it in the newspaper or in discussion with friends.

Q Was there a meeting held among the memebers of the Massachusetts Citizens Concerned for Life shortly thereafter?

A No, not that I know of. I do not attend the meetings of the Massachusetts Citizens Concerned For Life.

Q Are you familiar with the statement of the President of that organization that they were financing this lawsuit?

A No, I am not.

Q Are they, in fact, financing the lawsuit on behalf of the intervenors?

MR. BEHAR: I object.

[83] JUDGE ALDRICH: What is the objection?

MR. BEHAR: I don't think it is relevant.

JUDGE ALDRICH: I haven't quite followed the drift of this argument, but it seems to me he has been suggesting she is not a proper plaintiff. Otherwise, I don't see any point to it.

MR. LUCAS: I am just trying to ascertain whether or not they have standing. Certainly this question has been gone into with regard to Parents Aid Society. I want to ask a few simple questions about the Massachusetts Citizens Concerned For Life.

JUDGE ALDRICH: I notice in the briefs filed with us today by your brethren that there is no longer any attack made upon the standing plaintiffs. Have you abandoned that attack?

MR. BEHAR: I believe in the introduction to our brief we say that we incorporate the memorandum previously filed and not to repeat arguments we would rely on the previously filed memorandum.

JUDGE ALDRICH: All right. So you do still attack the standing?

MR. BEHAR: Yes.

JUDGE ALDRICH: Of every one of the plaintiffs?

MR. BEHAR: That is correct.

JUDGE ALDRICH: Well, then is it not appropriate to discuss the standing of this witness or this plaintiff?

[84] MR. BEHAR: I don't see how the financing of the case relates to the standing of this individual.

JUDGE ALDRICH: It might show what her interest was.

MR. LUCAS: Do we still have a question before the witness?

JUDGE ALDRICH: Yes.

Q Do you know who is financing the lawsuit on behalf of the intervenors?

A No, I don't. I made a small contribution myself.

Q Do you know where the large contributions are coming from?

A No, I don't.

Q One of the issues in the case has to do with the standing of the parties and I have to ask you some questions that I would rather not ask. But do you have any reason to believe that any of your daughters might be in need of abortion services?

A At this particular moment, I hope not but I have no way of knowing.

Q Are you speculating about any future possibility that they might have any need?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I may be illuminated in due course, but I don't see the objection to plaintiffs' standing or the objection to this lady's standing.

[85] MR. REYNOLDS: Very well, Your Honor.

Q In what way do you think this law may affect you?

A I think that in the event my child, my daughter might become pregnant and might decide to get an abortion without letting us know, that this would be a direct intervention in our communication as a family, parents and child, and we would not want to see her carry this burden of making this decision by herself, and the burden of secrecy which she would carry afterwards in order to keep it from us.

We feel it is very divisive. I was frankly quite outraged by the possibility of parents' consent not being required.

Q Are your views shared by your husband?

A Yes.

Q Do your daughters have any views on reproductive freedom?

MR. REYNOLDS: I object to that question, if your Honor please.

Q Or on the subject of abortion?

MR. LUCAS: I will withdraw that and ask this question.

JUDGE ALDRICH: Very well.

Q Do your daughters have any view on the subject of abortion, as far as you know?

A I don't think they have any definitive one-sided views, no.

Q Have they been exposed to the birth right and right to [86] life viewpoints on the subject of abortion by you?

A They have been subjected to our values and our views, yes. They understand that the unborn child is alive and is a human growing in the womb and that the undeveloped unborn child is a human being. These are what we felt were the positive things and important things to teach them.

Q Are these views you have inculcated in them as part of the family education?

A I would say this is part of our life, yes.

Q Have they had any sex education in your schools?

A Not in the public school, no.

Q Have you been active in opposing sex education in the schools?

A I have been active in opposing certain portions of sex education, yes.

Q What types of sex education have you opposed?

A The discussion of values as to sexual action and freedom as it would pertain to adolescents.

Q Do you oppose the discussion of both sides of the different types of values?

A I feel that the school is not a place for a debate forum on values.

Q What do you think should be encompassed in sex education in the schools?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: No.

[87] MR. LUCAS: I am just trying to get at the bias of the witness.

JUDGE ALDRICH: Excluded.

Q At one time were you a member or were you involved in the operation of the Birth Right organization?

A Yes.

Q Do you understand the policy of that organization to involve counseling individuals who are pregnant?

A Yes.

Q Does Birth Right ever refer individuals for abortions at abortion facilities?

A No.

Q Does Birth Right actively discourage —

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I'm sorry. I was talking to Judge Julian. What was the question?

MR. LUCAS: I was asking her questions concerning an organization by the name of Birth Right that she had been involved with.

JUDGE ALDRICH: We are not interested.

Q Have you been a contributor to the Massachusetts Citizens For Life?

A I contributed a total of two dollars.

Q Have you contributed a great deal of time?

A No, I haven't.

Q You indicated that if one of your daughters became pregnant, you would discuss the pregnancy and the [88] alternatives with her. What would you tell her about the status of the fertilized egg?

A I think we would talk with her about what state of pregnancy she was in at that particular time and deal with her as an individual person.

Q Would you tell her that there was a human being from the moment of conception?

A Yes. We have already told her that and she knows that.

Q Are these religiously based views of yours?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q What reasons would you give her primarily if she wanted an abortion and you just disagreed with her?

A What reasons would we give her for our disagreement?

Q Yes.

A I think we would not enter into it in terms of a discussion of disagreement, taking sides, and so on. I think it would be an exploratory kind of thing we would try to do with her in order to come together on the decision-making process. We regard the process of making the decision as immensely important for a family.

Q Would you encourage her under any circumstances to have an abortion?

A I don't think we would encourage her to have an [89] abortion, no.

Q In case she had been raped, would you encourage her to have an abortion?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q Would you object to her having an abortion if she had had German measles?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I really don't see the relevancy of any of this examination.

MR. LUCAS: The only relevance is to attempt to show some of the unreasonable grounds on which parental consent could be withheld.

JUDGE ALDRICH: I think you can argue those without producing them from any particular witness. Whether they are reasonable or unreasonable the Court will decide.

Q You indicated in your earlier testimony that there might be some circumstances under which if your daughter decided to go through with an abortion you would support her.

A Yes.

Q What were those circumstances?

A I think the circumstances would be discovered in the decision-making process. If we came to a [90] conclusion, all of us together and probably listening to some professional help: would this seem to be the best course at the time? Under those circumstances, we certainly would support her and would pay for it and we would help to choose the facilities and the gynecologist, and we would see her through it since we are associated with her from the moment of her conception until either one of us dies. We would always be committed to her.

Q Who would have the primary role in selecting the facility under such circumstances?

A I think that it would again be group decision, probably mostly involving her father and me, and the doctors that we would talk with.

Q Have either you or your husband had any medical training?

A Not specifically, no.

Q What does your husband do for a living?

A He is an electronics engineer.

Q If your daughter had an abortion without seeking parental consent, would you attempt to have her prosecuted?

MR. REYNOLDS: Objection.

MR. BEHAR: Objection.

A Oh, no.

JUDGE ALDRICH: You've got the answer.

MR. LUCAS: No further questions. Thank you.

United States District Court
District of Massachusetts

[Title omitted in printing]

Transcript of Testimony

October 18, 1977

* * * * * * * *

[64] JUDGE ALDRICH: Good morning, ladies and gentlemen. First off, the Court will submit 11 MILLION TEENAGERS as an exhibit subject to the limitations that were expressed in open court yesterday.

(11 MILLION TEEANGERS marked Plaintiffs' Exhibit 2 and received in evidence.)

MR. BALLIRO: If your Honor please, with respect to the requests for admissions Your Honor ruled were going to be taken up, and with respect to those we might be able to persuade the Court that indicate prejudice, Miss Schmidt is prepared to argue that this morning.

THE COURT: I am not clear. Argue each one of these matters?

MR. BALLIRO: We have agreed on the great bulk of them. There are very few in controversy.

JUDGE ALDRICH: Have you seen what we received from Mr. Henn?

MR. BALLIRO: I received that a few moments ago from Mr. Henn. I have no way to evaluate that. We have made our own evaluation and have spent a considerable amount of time on it.

JUDGE ALDRICH: You have cut it down to very few?

MR. BALLIRO: Very few.

JUDGE ALDRICH: I think you and Mr. Henn better get together. I will say to Mr. Henn that this does not [65] coincide with the concept that the Court had yesterday, the number you set forth here.

MR. HENN: The first 25 are now moot, so we are only talking about approximately, well, 15 from 48, at random.

JUDGE ALDRICH: You have requests 10 through 35. Are they all moot?

MR. HENN: Moot.

MR. MEYER: We are prepared to waive 10 through 35, and we thought a proper way to proceed was to read into the record the numbers of all those to which there are no objections, which are now additionally admitted, and then plaintiff or amicus curiae could argue at a later date additional ones that they wish struck.

What we would like to do now, with the Court's permission, is to read into the record the numbers of the

additional ones to which no one has objection and to which no further objection will be made.

MR. BALLIRO: I did not intend to bifurcate the arguments with respect to this. I think it ought not take too much time at all.

JUDGE ALDRICH: I think I would be much happier if at the morning recess or the noon recess counsel got together and a written stipulation be prepared and copies prepared for the Court. We don't want to go through [66] the mechanics either of listening to you as you list them off or checking them on our list. Hopefully you can prepare a stipulation which will cover all the matters except those left open.

Whereas you made a moving argument, Mr. Henn, yesterday with respect to how the class was injured, I was more moved by what Mr. Cole said, that the defendants should not be whip sawed between the two of you.

It was pointed out when you were given the authorization that you were given that if you found you were not receiving the proper cooperation from the plaintiffs, you should report that to the Court. That did not mean standing up in court at this late date and saying you didn't like what Mr. Balliro had done.

What is the next matter?

MR. BALLIRO: Dr. Nadelson, if Your Honor please.

MR. RILEY: May I have clarification, Your Honor, of the admission of 11 MILLION TEENAGERS? It is my understanding that only Sections 1 through 3 are being admitted and only the figures --

JUDGE ALDRICH: The statistics?

MR. RILEY: The statistical data and none of the narrative -- only the statistics that relate to abortion in minor girls.

[67] JUDGE ALDRICH: Where the statistics are summarized, in which it says 33% of this, that or the other thing, I assume that was admitted, too, but not the opinion of Mrs. Zilch that minors are particularly susceptible to this, that or the other thing.

MR. RILEY: Only the statistical data?

JUDGE ALDRICH: Only the statistical data in terms and as summarized.

MR. BALLIRO: Shall I proceed?

JUDGE ALDRICH: Please.

* * * * * * * *

CAROL NADELSON, Sworn

Direct Examination by Mr. Balliro

Q Will you please state your name?

A Carol Nadelson.

Q Would you kindly keep your voice up, if you would?

A Carol Nadelson.

Q What is your address?

A 30 Amory Street, Brookline, Massachusetts.

Q What is your occupation?

A I am a physician-psychiatrist.

Q Where are you currently employed?

A Beth Israel Hospital, Boston.

Q How long have you been employed at the Beth Israel Hospital?

[68] A Since 1964.

Q Dr. Nadelson, I direct your attention to the document in front of you that has been marked Plaintiffs' Exhibit 3, and ask whether or not you can identify that document.

A Yes.

Q What is it?

A My curriculum vitae.

Q In addition to the credits and articles and the list of your education and experience recited in Exhibit 3, have you written an additional article soon to be published?

A Yes. There is an additional article -- there are several actually that are not listed that are in the process of being published right now, one of which I gave you the galley for this morning, and then there are two others.

Q Would you merely recite them for the Court and indicate the publications in which they are to appear?

A This one is called Treatment of the Pregnant Teenager and the Putative Father that is to appear in Current Psychiatric Therapies which will be published in January of 1978. The others I have in draft are -- what is called The Impact of Abortion which

will be published in a book called The Woman Patient in June of 1978, and the other one is called The Pregnant Adolescent and that will be published in the American [69] Handbook of Child Psychiatry.

Q You are the same Dr. Nadelson who has previously testified in connection with these matters?

A Yes.

Q At the prior hearing before this Court?

A Yes.

MR. BALLIRO: I offer Exhibit 3, may it please the Court. Copies have been furnished to counsel.

JUDGE ALDRICH: It may be received.

MR. RILEY: I haven't received a copy.

MR. BALLIRO: I hand you a copy, Mr. Riley.

(Curriculum Vitae of Dr. Carol Nadelson marked Plaintiffs' Exhibit 3 and received in evidence.)

Q Now, Dr. Nadelson, have you read Massachusetts General Laws Chapter 112, § 12(p) and § 12(f)?

A Yes, I have.

Q Have you read them in connection with preparing yourself for your testimony at this hearing?

A Yes, I have.

Q Have you read the prior reported decisions having to do with this case?

A Yes.

Q Based upon your reading of the statute and the prior decisions in this case and your experience and your [70] education, do you have an opinion as to the psychological impact on the pregnant adolescent who because of her

parents' refusal to consent to an abortion has to seek to obtain approval from a Superior Court?

A Yes.

Q What is that opinion?

MR. MEYER: Objection.

MR. RILEY: I object.

JUDGE ALDRICH: The question is not, in the first place, sufficiently detailed because it does not include the manner in which she will have to seek permission of the Superior Court.

Q Dr. Nadelson, would you assume as a basis for an opinion the following facts: that a pregnant adolescent seeks approval of both her parents for an abortion and that that approval is refused, that the pregnant adolescent then makes an application to a State Superior Court judge for judicial approval of an abortion.

Now Doctor, do you have an opinion based upon your education and experience -- ?

JUDGE ALDRICH: I will interrupt you right now. Apparently you did not hear my objection to the question. You did not include in your question the manner in which the Superior Court proceedings would have to be carried on. In other words, I can conceive readily of differences [71] connected with how one obtains and must obtain approval of the Superior Court.

MR. BALLIRO: Forgive me, Your Honor.

JUDGE ALDRICH: Is it done in camera?

MR. BALLIRO: I assume she would be including in the hypothesis the methods set forth, such as it has been set forth by the Supreme Judicial Court in its opinion. She has indicated that she has read that.

JUDGE ALDRICH: You are ahead of me there in that my memory does not cover all those details. I remember this much. I don't think they were very detailed.

MR. BALLIRO: That is part of my problem, if Your Honor please. We sought, by way of -- of course, by way of stipulation, which did not happen to be agreed to --

JUDGE ALDRICH: It is still part of your problem, your initial problem in proving the case, and to the extent there may be distinctions in the conduct of the Superior Court, that is going to be part of our problem, too, and we can't get rid of them by not asking about them.

JUDGE JULIAN: In any event, are you limiting the question to the first trimester pregnancy?

MR. BALLIRO: I will do that. I wasn't, as a matter of fact.

[72] JUDGE JULIAN: I suppose the more along in pregnancy perhaps the more susceptible she might be subject to more psychiatric stress and strain. Are you interested in anything beyond the first trimester?

MR. BALLIRO: Frankly, I was not. I will limit it to that and take it in sequence, both the first and second trimester.

JUDGE ALDRICH: All right. I will amend your question for you, if you don't see how it ought to be done.

Let us assume that the Superior Court proceedings will be designed not as they have been presently expressed in the Superior Court rule or as suggested by the Supreme Judicial Court, but in what you would consider to be the most benign approach that could be made.

THE WITNESS: Do you want me to answer that?

JUDGE ALDRICH: I can't hear you.

Q Yes. Do you have an opinion?

A Yes.

Q Based upon that hypothesis as to the psychological effect upon a pregnant adolescent who is in the first trimester?

A Yes, I do.

Q What is that opinion?

A I think that the impact of the requirement to initiate judicial proceedings of any kind would be [73] severely detrimental to a teenager, particularly since she has just met with her parents' disapproval, which is difficult enough.

JUDGE FREEDMAN: Is that because she would be afraid to go into court or afraid to go into court over her parents' objection?

THE WITNESS: Both.

Q Assuming the same hypothesis, Doctor, with respect to a pregnant adolescent in the second trimester, do you have an opinion as to the psychological effect upon that adolescent?

A It would probably be pretty much the same.

Q Assuming, Doctor --

JUDGE ALDRICH: I am sorry to keep mentioning this, but it would be helpful if we did not have to work to hear what you say.

THE WITNESS: I will try.

MR. BALLIRO: Your Honor, would you like her answer repeated?

JUDGE ALDRICH: I heard her answer. If I spend 20% of my effort trying to hear the answer, then I lose that much understanding what she is saying.

Q Assuming, Doctor, the same hypothesis, do you have an opinion as to the psychological impact on the pregnant adolescent in the first trimester in relation to her [74] family situation?

A Yes.

Q What would your opinion be?

A Well, generally speaking the teenager who is pregnant is apt to be having some difficulty in her family situation to begin with. The request for an abortion which they might not

approve of is certainly going to add to that stress and may further disrupt family relationships. Although we like to consider the family as being concerned about the best interests of their children, there are many times when they are not concerned about that, or at least aware that what they are doing may not be in the best interests of their youngster, and there are other times where it is very difficult for them to know what the best interests may be in a situation that is new to them and that may be quite traumatic to them.

Q Having in mind the statutory requirement, Doctor, to obtain, first, parental consent, if that is possible, and then judicial consent if the parents' consent is not forthcoming, have you, based upon your experience and training, an opinion as to whether or not some pregnant adolescent would seek alternative methods or ways of obtaining their abortion?

A Yes, I do, sir.

Q What is your opinion in that regard?

[75] MR. MEYER: Objection.

JUDGE ALDRICH: She may answer.

Q What is your opinion, Doctor?

A Could you repeat the question?

Q Surely. Having in mind the statutory requirement that an adolescent, a pregnant adolescent must first seek to obtain permission of both parents, and if that is not forthcoming, the judicial approval of consent for the abortion, do you have an opinion as to whether or not some teenagers would seek alternative means of obtaining their abortion?

A Yes.

Q What is your opinion?

A Teenagers in this situation are apt to and have in the past sought to obtain an abortion by means that they may see as less difficult for them and those means may in fact be more dangerous to them ultimately.

JUDGE JULIAN: Can you tell us what those means may be on the basis of your actual experience?

THE WITNESS: On the basis of my experience in the past with this issue, teenagers have sought abortions illegally.

JUDGE JULIAN: That is a characterization. By doing what?

THE WITNESS: By going out of state, by [76] attempting abortions themselves or finding non-medical means of obtaining abortions be it friends or people in the community who are known to provide the services rather than, one, confront their parents, and two, confront any other authority about the problem.

JUDGE JULIAN: Do you happen to know the frequency with which this sort of thing has happened in the past?

THE WITNESS: Well, it is difficult --

JUDGE JULIAN: On the basis of your own experience now.

THE WITNESS: It is difficult to be more specific because people do not report illegal abortions. You obtain the data from histories retrospectively and from people who come into emergency rooms with septic abortions.

JUDGE JULIAN: How many such histories have you had in your experience?

THE WITNESS: In my experience? When I was working in this area at a time when abortions were far more difficult to obtain, we would see -- I would see personally several every week.

JUDGE FREEDMAN: Over how long a period of time?

THE WITNESS: This started from the time I started to work at the Beth Israel until 1973 or 1974.

[77] Q Would that indicate to you, Doctor, that there were a substantial number of pregnant adolescents who would seek alternative means?

A Yes.

Q Do you have an opinion, Doctor, whether or not those that would seek alternative means would more likely than not endanger their health or life?

MR. MEYER: Objection. More likely than not?

JUDGE ALDRICH: What is the objection?

MR. MEYER: I don't know that this witness' expertise would suggest she would be able to answer the question about whether those who sought the abortion would do something to endanger their health. That is a medical question as to what they would so, I suggest.

JUDGE ALDRICH: Do you seriously think there can be more than one answer to that question?

MR. MEYER: I am suggesting, Your Honor --

JUDGE ALDRICH: I asked you a direct question.

MR. MEYER: No, Your Honor, I believe this witness would answer yes.

JUDGE ALDRICH: Not what this witness would answer. Would you suggest otherwise yourself?

MR. MEYER: I will withdraw the objection, Your Honor.

Q Doctor, based upon your education and experience, do you [78] have an opinion as to the relative risks of an abortion in the first trimester as compared to the risks of other medical and surgical procedures that an informed minor is permitted to consent to in accordance with the statute?

MR. RILEY: I object.

A Yes.

JUDGE JULIAN: I don't understand the question.

JUDGE ALDRICH: It's a pretty broad question.

MR. BALLIRO: I was trying to narrow it down.

Q Based upon your education and experience, Doctor, do you have an opinion as to whether or not there is a greater risk attendant to an abortion --

JUDGE ALDRICH: You are referring now to physical consequences?

MR. BALLIRO: Yes, Your Honor.

Q With respect to an abortion on a pregnant adolescent in a first trimester of pregnancy as compared to other medical and surgical procedures?

JUDGE ALDRICH: That is why I said it is too broad.

MR. BALLIRO: Other medical or surgical procedures.

JUDGE ALDRICH: You sort of answered the question. Would you go through some of these?

MR. BALLIRO: Strike it out.

[79] JUDGE ALDRICH: We are interested in the Doctor's qualifications. If she is talking about an appendectomy, maybe she never performed an appendectomy. Maybe she is not qualified to say how dangerous it is.

MR. MEYER: I would suggest, respectively, Your Honor, that her curriculum vitae indicates Dr. Nadelson did her residency in medicine and also her opinion in this regard is admissible --

JUDGE JULIAN: I think when Mr. Riley is objecting, we want to know exactly what he is objecting to.

MR. BALLIRO: I will try to reframe the question.

Q Doctor, based upon your education and experience, do you have an opinion as to what medical and

surgical procedures might be undergone by an adolescent would be more serious in terms of potential harm to the patient --

JUDGE ALDRICH: Physical harm?

MR. BALLIRO: Physical harm to the patient.

Q -- than an abortion performed during the first trimester?

A Based on --

MR. RILEY: The question is does she have an opinion?

JUDGE ALDRICH: Do you have an opinion? Waht [80] is your answer?

THE WITNESS: Yes.

Q What is that opinion?

JUDGE ALDRICH: You object to her giving the opinion?

MR. RILEY: Yes, Your Honor.

JUDGE ALDRICH: She may answer.

Q What is that opinion, Doctor?

A Based on my experience in this area the risk of abortion is less than the risk, for example, of cardiac

surgery, which a teenager, as I read the law, could consent to.

Q Are there other medical or surgical procedures that fall in that same class?

A Yes, there are. I think there are a whole host of them.

Q Would you relate those that you feel fall under this classification?

A I could spend a day doing that. I think basically what we are dealing with are the relative risks of surgical procedures in general, and depending on what the status -- the physical status of the person is, and the anesthetic and other risk factors, there is a classification available about, you know, what the relative risks are. An example that struck me in reading [81] the law is a teenager could properly consent to a hysterectomy and not to an abortion. Hysterectomy is not mentioned specifically in the law.

MR. MEYER: I object to the extent the answer contains a conclusion of law.

JUDGE ALDRICH: The Court will disregard it to the extent it contains a conclusion of law.

Q So you do have an opinion, Doctor, that the physical risk attendant to a hysterectomy is greater than that of an abortion in the first trimester?

A Yes.

Q Directing your attention, Doctor, to the psychological impact of medical and surgical procedures to which an informed minor may consent under the law, do you have an opinion as to whether or not the psychological impact is greater or less than an abortion performed on an adolescent during the first trimester?

A Yes, I do.

Q What is your opinion?

MR. RILEY: Objection.

JUDGE ALDRICH: Do you object to the way the question is phrased?

MR. RILEY: I object to the scope of the direct examination. I believe two and a half years ago Dr. Sturgiss and Dr. Hodgkins testified, as well as Dr. [82] Nadelson, on the relative psychological and medical implications of an abortion. Those matters have not changed despite the interpretation of the statute and the decision of this Court and the Supreme Court, and I think that the direct examination should be limited to the statute as interpreted.

I think that is the sole issue before this Court and that is why the Court decided to take additional evidence.

MR. BALLIRO: This statute was not in effect at the time of the last hearing. It was passed since then, Your Honor.

JUDGE ALDRICH: I am lost now with respect to both of you. First, Mr. Riley, are you saying the witness is being asked questions that have already been fully covered?

MR. RILEY: I believe there was a full opportunity to go into the relative psychological risks and the medical risks of abortion for minor girls at the initial hearing.

JUDGE ALDRICH: Not that it has already been covered, but could have been covered?

MR. RILEY: Has been covered and could have been covered.

JUDGE ALDRICH: Those are two separate matters. [83] To the extent it has been covered, that is a reasonable objection. But are you saying that the witness having testified once the plaintiffs can not pursue the matter any further?

MR. RILEY: This matter would have come up on summary judgment last April except for the factual differences

that occurred as a result of the interpretation by the Supreme Juducial Court.

JUDGE ALDRICH: Not the factual differences in medical practice but the matters that might become more important.

MR. RILEY: It was my understanding that the purpose of this hearing was to obtain evidence on the medical or psychological implications of the -- the impact the statute has as interpreted by the Supreme Judicial Court, and that the general issue of abortions for minors and the medical and/or psychological implications were matters that had been covered in the previous hearing, and unless there are new findings or new medical evidence, I think that it is just rehashing what was covered by the Court two and a half years ago.

JUDGE ALDRICH: Now you are confusing me again when you say that

we are rehashing, we are covering the same matter over again.

MR. RILEY: I think that that matter was fully [84] covered by the evidence.

JUDGE ALDRICH: If it was fully covered, the Court will be very sympathetic to your position. I assume the second part of your objection was that it was not fully covered but it was too late and there were only certain things now open.

MR. RILEY: My specific objection is that this has been covered.

JUDGE ALDRICH: What do you say to that, Mr. Balliro?

MR. BALLIRO: I suggest that the equal protection argument, which we agree is an issue, I suggest that it could have not been covered because Section (f) was not passed until after our last hearing, and this question bears directly on the import of Section 12(f).

JUDGE ALDRICH: Go ahead.

Q Do you recall the question, Doctor?

A Would you repeat it?

Q Yes. Based upon your education and experience, do you have an opinion as to whether or not there are other medical or surgical procedures that have a greater emotional impact on the pregnant adolescent than an abortion that is performed during the first trimester?

JUDGE ALDRICH: She said she had one. Now the question is what is the opinion?

[85] A I think that the evidence that has accumulated, and even more specifically, more recently than the last hearing, seems to indicate that abortion in and of itself does not have serious psychological consequences, and certainly there are procedures, as I mentioned, such as cardiac surgery,

neurosurgery, hysterectomies, which would have more profound psychological implications because they would derive from a situation where the person is either more ill to begin with or the repercussions later on for her life would be more severe.

Q Would you include a mastectomy among those surgical and medical procedures that would have a greater psychological impact than abortion during the first trimester?

A Yes.

Q Based upon your education and experience, Doctor, do you have an opinion as to whether or not the psychological consequences for a pregnant adolescent carrying her pregnancy to term is greater than whether or not she has an abortion in the first trimester?

A Yes.

Q What is your opinion in that regard?

A For the adolescent who does not want to continue her pregnancy being put in a position where she must do so requires that she not only perhaps change her life plans and goals but that she is then responsible [86] for making subsequent decisions which may be exceedingly difficult for her to make, and she may subsequently be responsible for the care of another individual.

Q Would you say that that psychological impact that you just testified to would apply to a substantial number of pregnant adolescents who were forced to carry their pregnancy to term?

A Yes.

MR. BALLIRO: That is all.

JUDGE ALDRICH: Mr. Meyer.

* * * * * * *

CROSS-EXAMINATION BY MR. MEYER

Q. Dr. Nadelson, I show you three volumes of transcripts of a deposition that the defendants took of you in the months of August and September of 1977. I ask you if you could identify those three documents, please.

A Yes.

Q Have you had an opportunity to read and sign those three volumes of that deposition?

A I have.

Q I take it you had no corrections to the questions and answers that were taken at the deposition, is that correct?

A That is correct.

MR. MEYER: If Your Honor please, the defendants offer the first two volumes of this deposition in an effort [87] to speed up the cross-examination of this witness as Defendants' Exhibit A.

MR. BALLIRO: I have no objection, Your Honor.

MR. MEYER: We have previously filed copies with the Court, so there are four copies in the record, and we will file the originals now.

JUDGE ALDRICH: What did you want to say, Mr. Riley?

MR. RILEY: We have no objection as long as it is understood that matters of relevancy and materiality can be put in the briefs or argument.

JUDGE ALDRICH: Judge Julian has a very reasonable problem. I assume that counsel are going to argue, preferably brief, what is considered to be immaterial and irrelevant and vice versa because that has to be done at some time. It seems to me that it would be better to do it at present than later and rather than go through the deposition question by question. Our admission does not mean that every bit of that testimony is relevant. I suspect that a great deal is not.

MR. BALLIRO: From my conversation with counsel that all of it was to be considered relevant.

JUDGE JULIAN: What was your understanding?

MR BALLIRO: My understanding was that he was [88] going to use it as some direct relevant questions to the witness.

JUDGE ALDRICH: And merely for that purpose?

MR. BALLIRO: That is correct, Your Honor.

JUDGE ALDRICH: In other words, it is not in evidence?

MR. MEYER: If Your Honor please, the purpose of putting it in evidence is to have the document in evidence, and to the extent any part of it is considered to be immaterial or irrelevant, and I don't believe any parts of it are, of the first two volumes, I have no objection to anyone arguing in their post-trial briefs

that parts should be ignored. I do not believe there are any that fall within that category.

It is my recollection that the first two volumes pertain exclusively to the witness' testimony concerning the psychological and physiological impacts of abortion.

MR. BALLIRO: As an alternative to that, Your Honor --

JUDGE ALDRICH: We don't need an alternative. That is satisfactory.

MR. MEYER: That exhibit is admitted, Your Honor?

JUDGE ALDRICH: Yes.

[89] (Two volumes of deposition transcript of Dr. Nadelson marked Defendants' Exhibit A and received in evidence.)

Q Doctor, I would like to list several possible motivations that have been reported in the literature as motivations which cause adolescent

pregnancies, and I would ask if you would agree these are in fact motivations that do exist: (1) self punishment?

A Yes.

JUDGE JULIAN: Self what?

MR. MEYER: Self punishment.

JUDGE ALDRICH: I am awfully sorry, but I did not get the first part of the question. This is a list of what?

MR. MEYER: Motivations which the literature has reported cause teenagers to have unwanted pregnancies. I am asking this witness if she would agree she believes that these are motivations which do cause --

JUDGE ALDRICH: Cause them to become pregnant in the first instance?

MR. MEYER: Yes, Your Honor.

JUDGE ALDRICH: I thought that is what you said. All right.

Q (2) replacing a loss?

A Yes.

Q (3) depression?

[90] A Yes.

Q (4) countering deprivation in childhood?

A Yes.

Q (5) hostility to parents?

A Yes.

Q (6) uncertainty concerning the teenager's femininity?

A Yes.

Q (7) a desire to be like the teenager's mother?

A Yes.

Q Are these seven motivations that we have just listed motivations that indicate the need for psychiatric intervention with respect to the adolescent?

A Not necessarily.

Q Do they usually indicate the need for psychiatric intervention?

A No.

Q Do they sometimes indicate the need for psychiatric intervention?

A Yes.

Q Are these seven possible motivations motivations that indicate the need for psychiatric intervention with the adolescent's family?

A Sometimes.

Q Are these seven motivations factors that the adolescent might very well have been unaware of themselves?

[91] A Yes, sir.

Q In fact they would probably be unaware of them, is that correct?

A Yes sir.

Q I would like to read to you, Doctor, several psychological effects that abortion have on adolescents that have been reported in the literature and ask you if you would agree that these are psychological effects that abortions have.

A Could you cite your source?

JUDGE ALDRICH: I can't hear you.

THE WITNESS: I would like to hear the sources cited.

JUDGE ALDRICH: Well, I don't suppose he has to give the source because he is merely asking whether your opinion coincides with the question he is going to put -- rather the statement he is going to put.

Q The first psychological effect is guilt?

A Yes.

Q The second one is a sense of loss?

A Yes.

Q The third one is an arresting of the developmental process?

A You are speaking about abortion?

Q Yes, I am, Doctor.

A Not usually.

Q It can result, is that correct, Doctor?

[92] A It could.

Q The fourth one is an increase in the minor's degree of dependence on the minor's parents?

A Not likely.

Q Can it happen, Doctor?

A I suppose so.

Q The fifth one is a withdrawal from social relations?

A Not likely.

Q It can happen?

A It could.

Q The sixth one is preoccupation with feelings of ugliness?

JUDGE ALDRICH: Feelings of what?

MR. MEYER: Ugliness.

A The last three are more likely to occur with pregnancy than with abortion.

Q Could they result from an abortion on a teenager?

A They could.

Q The seventh one is anniversary reaction?

A Yes.

JUDGE ALDRICH: What is that?

MR. MEYER: Anniversary reaction.

Q Would you briefly explain what that is, Doctor?

A That would be a response often of a depressive reaction or some other symptom which would occur on the anniversary of an important event.

[93] JUDGE ALDRICH: I need a little more knowledge than that.

JUDGE JULIAN: What important event are we talking about?

THE WITNESS: He is referring to abortion. One could experience some symptomology, for example, on the anniversary of the year following an abortion.

JUDGE ALDRICH: Do you mean like birthday you have an abortion day?

THE WITNESS: Yes.

Q The eighth one is severe crying spells upon seeing children of pregnant women?

A That could happen.

Q In fact, all the eight that I listed have been reported in the

literature to your knowledge, is that correct, Doctor?

A I think those have been reported for pregnancy and not for abortion.

JUDGE JULIAN: Which are you attempting to bring out?

MR. MEYER: I was talking about abortion.

JUDGE JULIAN: Make it clear.

JUDGE ALDRICH: He made it clear and the witness did not agree with him.

MR. MEYER: With respect to the specific answers she agreed that they could result. With respect [94] to my general question, whether she agreed that they were in the reported literature, she disagreed.

JUDGE ALDRICH: I see. Well, I don't think she disagreed. Doctor, did you disagree that they were in the literature or was your answer that they were in the literature but more heavily weighted with respect to pregnancy?

THE WITNESS: The latter. They certainly are more heavily reported in the literature on pregnancy.

JUDGE ALDRICH: Both ways?

THE WITNESS: I am not familiar with the last few, the middle statements in the literature on abortion in teenagers.

Q To the extent these eight psychological effects from abortion do exist would they indicate the need for psychological counselling of the teenagers?

A They might.

Q To the extent that these exist would they indicate the need for psychological counselling of the teenager's parents?

A They might.

Q Doctor, are you able to quantify the degree to which these particular results or the frequency with which they would indicate counselling?

A No.

[95] Q Would you tell me what to your knowledge the literature reports as the recidivism rate for unwanted pregnancies among unmarried adolescents?

A That varies with the report you read, and it ranges all the way from about 15% to 95%.

Q Is it correct, Doctor, in your clinic's experience that the recidivism rate is approximately 25%?

A That is what it has been in the past. I don't know what it is this year.

Q I take it that it is correct, is it not, the recidivism rate would vary depending upon the population one is looking upon?

A Yes.

JUDGE JULIAN: On what?

MR. MEYER: The population being studied.

Q Would you agree, Doctor, the 25% figure for recidivism provides a fair estimate of the overall national or statewide recidivism rate?

A Probably.

Q Can counselling of the teenager help reduce recidivism?

A It has been reported to and most people believe it does.

Q Do you believe counselling can help reduce recidivism?

A Yes.

Q Would you tell me, Doctor, and explain to the Court why [96] recidivism is a problem for teenagers who have unwanted pregnancies?

A I do not quite understand the question.

JUDGE ALDRICH: Obviously recidivism is a problem if it occurs. What you meant, I suppose, is why does it occur?

MR. MEYER: I will rephrase the question.

Q Would you describe some of the adverse psychological effects that recidivism of unwanted pregnancies has upon minors?

MR. BALLIRO: I don't think I understood that question.

JUDGE ALDRICH: I thought I did. We will leave it to Mr. Balliro to clear up. You may answer.

A I am not clear on that question.

Q Let me go back a step, please, Doctor. Does recidivism in unwanted pregnancies among adolescents have effects?

A Yes.

Q Would you describe to the Court what the effects are?

A Well, certainly the teenager who has had one pregnancy, depending on the resolution of it, has a different kind of life course and psychological development than she would have had if she didn't. It certainly has been reported, and it

has been true in my experience, that a teenager who has had a pregnancy and has, say, continued [97] the pregnancy, is more likely not to be in school, is more likely to be on welfare, is more likely to have difficulties in relationships subsequently. That has not been reported for teenagers who have had abortions.

I would like to list certain causes of recidivism for unwanted pregnancies in minors that have been reported in the literature and ask you if you would agree if these are in fact some of the causes of recidivism: (1) actions of adolescents are not necessary future oriented?

A Yes.

Q (2) The conceptualization of the adolescent's self as an adult is very difficult?

A Yes.

Q (3) Family difficulties and instabilities which may cause stress, which may in turn lead to pregnancy?

A Yes.

Q (4) Peer pressure?

A Yes.

Q (5) Lack of knowledge of contraception?

A Yes.

Q (6) Despite knowledge of contraception, the lack of the use of knowledge?

A Yes.

Q (7) The belief in mythologies and fantasies concerning the possibilities of pregnancy?

[98] JUDGE ALDRICH: Do you mean the possibility of abortion?

MR. MEYER: The possibility of an unwanted pregnancy.

JUDGE ALDRICH: I still don't know what you mean. Mythology of avoiding the pregnancy or mythology as creating the pregnancy?

Q Dr. Nadelson, the term mythology fantasies is reported in the literature, is it not, as leading to unwanted pregnancies, and could you please explain how that happens?

A Yes. That refers to an idea, for example, that a teenager might have that she could not become pregnant the first time she had intercourse.

JUDGE ALDRICH: That is what I meant by avoidance.

Q Would you agree with the following statement, Doctor, "It really takes most teenagers until the end of adolescence, maybe 18 or 19, before they really have a concept of themselves in the world and ability to make a plan that takes into account what the ramifications of an action like pregnancy may be"?

A Yes, sir. That is not true for everybody.

Q Would you agree with the following statement, Doctor, "A minor's decision to have an abortion may be the first [99] time in that minor's life where they have to determine a life goal which may be immutable"?

A Yes.

Q Would you agree with the follow-up to that quotation, Doctor, that the decision whether or not to have an abortion may have a life-long effect?

A That leaves out the other half of the issue.

JUDGE FREEDMAN: Keep your voice up. I can't hear you.

THE WITNESS: I said that that leaves out the other half of the issue.

JUDGE ALDRICH: I haven't heard you.

THE WITNESS: Well, that has to do with --

JUDGE ALDRICH: I haven't heard your answer.

THE WITNESS: I said that it leaves out the other half of the issue which has to do with pregnancy.

Q In your opinion, Doctor, is it correct that the two to four day delay for the purpose of counselling an adolescent who has an unwanted pregnancy is a proper delay?

A That would be fine.

JUDGE JULIAN: What is your answer?

THE WITNESS: That would be fine.

Q Is it your opinion, Doctor, that a one week delay to counsel an adolescent with an unwanted pregnancy is [100] manageable?

A It depends on the stage of the pregnancy.

Q Would you expand upon that, Doctor, please?

A Well, if someone comes in eleven and a half weeks pregnant, it would be very difficult for her to

have to wait a week because she would put herself in considerable jeopardy physically and emotionally.

Q Did you earlier testify at a deposition, Doctor, that a seven day delay was manageable?

A It depends on the situation.

Q Doctor, you expressed certain opinions this morning concerning the psychological burden of courtroom proceedings. I would like to ask you how many times have you been to court with a patient of yours in some courtroom?

A Do you mean with an adolescent?

Q Yes.

A I have not.

Q With the exception of this case, Doctor, how many courtroom proceedings have you been personally involved in?

A Not very many. I couldn't be more specific than that.

JUDGE FREEDMAN: Do you mean as an expert witness?

MR. MEYER: No. I should make that more clear, Your Honor.

[101] Q How many courtroom proceedings have you been involved in any fashion, Doctor?

A Less than five, I am sure.

Q Does counselling of the teenager who has an unwanted pregnancy and the counselling of her parents always produce agreement on the chosen course of action?

A No.

Q If agreement is not attained by counselling between the teenager with an unwanted pregnancy and her parents, I take it that someone would have to resolve that difference, is that correct?

A Somebody would, yes.

Q Doctor, you have indicated in your deposition that for some teenagers with unwanted pregnancies

parental consultation is objectively contraindicated. Is that correct?

A Yes.

Q Would you explain to the Court what objectively contraindicated means?

A Well, on the basis of the evidence we have the adolescent's parents have been known to be child abusers or are likely to be or are people who are seriously mentally ill or are in some way unable to really be helpful or involved in that situation and might in fact jeopardize the welfare of that youngster.

Q Is it a fair summary, Doctor, when you use the term [102] objectively contraindicated, you mean that when you learn the facts you as a doctor would agree that parental consultation is contraindicated?

A Yes.

Q Is it correct than in your private practice, Doctor, you believe

that parental consultation is objectively contraindicated approximately 5% of the time?

A Not in my private practice; in my work in the hospital.

JUDGE JULIAN: Is there a difference between the two?

THE WITNESS: Yes, there is.

JUDGE JULIAN: State both of them.

THE WITNESS: Well, in my private practice I do not see very many youngsters in this situation. Most of my work in this area is through the Beth Israel and Children's Hospital.

JUDGE JULIAN: With respect to your hospital experience?

THE WITNESS: With respect to my hospital experience that would be roughly correct.

JUDGE FREEDMAN: 5%?

THE WITNESS: Yes.

Q With respect to your private practice, Doctor, what would the percentage be?

A I really can't be more specific than that because the [103] number is not very great, so I don't really have an adequate sample.

Q Let me show you Volume 1 of your deposition, which is Defendants' Exhibit A for Identification, Page 41, and ask if in that deposition you stated words to the effect that in your private practice it probably runs less than 5% and in the clinic it probably runs maybe close to 10%?

A Yes.

MR. BALLIRO: If Your Honor please --

JUDGE ALDRICH: Well, is that your present answer?

THE WITNESS: That is true. I did say that.

JUDGE JULIAN: What is it then? Is it 10% or 5%?

THE WITNESS: Can I give my personal opinion?

JUDGE ALDRICH: I think we ought to give Mr. Balliro a chance to speak, who may have some problem about the deposition.

MR. BALLIRO: I do, Your Honor please, because I suggest that a very important part of that answer has been left out, namely, the words "that is really a guess".

JUDGE ALDRICH: I think Judge Julian is a little troubled and perhaps the rest of us are that she gave 5% at one time and 10% at another time.

MR. BALLIRO: I merely point out that that is [104] what she answered in the deposition.

JUDGE ALDRICH: All right. You may continue, Mr. Meyer.

Q Doctor, would you explain to the Court what you mean when you use the term or say that parental consultation is subjectively contraindicated?

A That we have specific evidence -- that we know for a fact that something has happened like a father has beaten his child or something like that rather than that we have heard a report that that is so and have not such clear evidence.

JUDGE FREEDMAN: You mean actual case studies that you can rely on?

THE WITNESS: Yes.

JUDGE JULIAN: I don't quite understand the use of the word subjective in that connection.

THE WITNESS: Well, I am just trying to remember the context in which that was said in the first place.

JUDGE JULIAN: Said by whom?

THE WITNESS: I assume it was said in the deposition.

MR. MEYER: Your Honor, may I go to the next question?

JUDGE ALDRICH: Yes.

Q Is it correct, Doctor, that when you use the term subjectively [105] contraindicated, you mean that

in the opinion of the adolescent the adolescent does not want the parents consulted and this may or may not prove out to be correct upon further investigation?

A I want to retread back where we were in the first place. Could you read to me the statements where it says subjective and objective and then I will try to clarify as best I remember?

Q I think we can cut this short, Doctor. Is it true that many adolescents with unwanted pregnancies believe that their parents should not be consulted and that these beliefs prove out to be not correct upon further investigation?

A In some cases that is true, yes.

Q And to the extent that that is true, is it correct that parental consultation is helpful?

A Yes.

Q Could you give me an estimate of how many times in your private practice you have dealt with patients in which the patients have said they believed their parents should not be consulted but upon further investigation it has been determined that the parents should have been consulted?

A I can only make a guess. I would prefer not to be more specific.

Q Do you have an estimate that is based upon actual knowledge?

[106] A You would have to know what percentage of patients I see and what my private practice is like to have it be meaningful.

Q Do you have an estimate for the patients you see at the clinic at the hospital?

A Again, it would be a guess. I do not have the figures at hand right now.

Q Is 40% a reasonable figure, Doctor?

A That is probably close.

Q You testified earlier this morning in response to a question by Mr. Balliro that some adolescents will seek different alternatives if they are forced to courtroom proceedings. I would like to ask you if you would agree that it is impossible to have data on that?

JUDGE JULIAN: Impossible what?

Q It is impossible to have data on that?

A Yes. It is only a guess.

Q I would like to ask you if you agree with the following quotation: "As to the issue of having a baby, a ten year old wouldn't have the foggiest idea what a pregnancy was really unless they had a mother or a sister or somebody who was pregnant around them and that is often the experience but not always the experience of any of us"?

A Yes.

Q Doctor, I take it you are not a surgeon, is that correct?

[107] A That is correct.

Q You are not a specialist in internal medicine, is that correct?

A That is correct.

Q Do you know how often mastectomies are performed on adolescents?

A No.

MR. MEYER: I have no further questions.

JUDGE ALDRICH: Mr. Riley.

* * * * * * * *

CROSS-EXAMINATION BY MR. RILEY

Q Doctor, at your clinic when an adolescent comes to see you or someone on your staff when is the determination of that child's ability to give an informed consent for an abortion made?

A Let me clarify before I answer that question that the question you are asking may refer to a job that I had two years ago and that currently I am not doing exactly that work.

Q Do you make the determination now as to an adolescent's ability to give an informed consent?

A I may on occasion, yes.

Q Generally you do not?

A Personally, I generally do not.

Q When you deal with a patient personally, has that [108] determination been made at some prior time by a psychologist or other physician?

A Yes, that is generally true.

Q So when an adolescent comes to see you, a determination has already been made as to that adolescent's ability to give an informed consent?

A Yes.

JUDGE JULIAN: Your answer is yes?

THE WITNESS: Yes.

Q At your clinic are you concerned solely with counselling for abortions?

A No.

Q Do you counsel for other medical procedures?

A For other medical procedures and for pregnancies.

Q Apart from abortions and medical procedures are there other medical procedures for which there are formal counselling procedures set up at the hospital?

A Oh, yes.

Q What types of procedures would they be?

A A procedure that we would view as having long-term implications where alternatives have to be weighed.

Q These are the types of procedures in which counselling is required?

A Well, there is no such thing as required. You can't force anyone to be counselled. We suggest and try.

[109] Q This is good medical practice?

A Yes.

Q If an adolescent desires to be sterilized, what would be the best medical practice concerning counselling?

A It would probably be very similar to a number of other procedures that would happen. I think what we would start out with is attempting to evaluate the request and the ability of that youngster to make a decision based on whether the youngster understood the implications of what that was and what alternatives there were to that proceudre and then work from there.

Q Would the counselling procedure be substantially parallel to the abortion counselling?

A All counselling procedures are roughly similar.

Q When you speak of long-term implications, medical procedures that have long-term implications, would that be concerned with, say, a leg being amputated due to cancer or brain surgery on a child?

A Yes.

JUDGE ALDRICH: Is your answer yes?

THE WITNESS: Yes.

Q If a determination was made that an abortion would not be in the best interests of an adolescent, what would be the psychological implications, if an objective determination was made what would the psychological [110] implications be for that minor if she was to have an abortion?

A Those are two different questions, and I do not have any specific details, so it is hard for me to know how to answer that.

Q Have you ever advised that a minor not have an abortion?

A I don't advise people what to do. I just try to understand what it is they want to do.

MR. RILEY: I have no further questions.

* * * * * * * *

RE-DIRECT EXAMINATION BY MR. BALLIRO

Q Dr. Nadelson, is there a distinction between the psychological impact of a decision to be sterilized versus a decision to have an abortion?

A Oh, yes.

Q What is the distinction that you would draw?

A Well, sterilization is a permanent procedure and at this point there is no recourse on the ones that that happens [sic] and so it is a

procedure with far more serious consequences to anybody. That would certainly be one very important aspect of it.

When one has an abortion, another pregnancy is possible at another time.

Q Do you think it is reasonable to compare, Dr. Nadelson, the need for either parental consent or judicial approval [111] of sterilization as opposed to or as compared with abortion? Do you think there is a reasonable comparison?

MR. MEYER: Objection.

JUDGE ALDRICH: Would you rephrase the question? Perhaps she has already testified to it.

MR. BALLIRO: Perhaps she has already answered it.

JUDGE ALDRICH: I think you might withdraw the question.

MR. BALLIRO: I do withdraw the question. That is all.

MR. MEYER: No further questions.

MR. RILEY: No further questions.

JUDGE ALDRICH: May the doctor be excused?

MR. BALLIRO: Yes, Your Honor.

JUDGE ALDRICH: Thank you, Doctor.

MR. MEYER: With one exception, Your Honor. Some of the requests for admissions that defendants have, which have been already admitted but which plaintiffs and amici --

JUDGE ALDRICH: If they become unstuck, you might like the doctor back?

MR. MEYER: It would be our intention that she might be back as our witness.

JUDGE ALDRICH: That is understood.

[112] MR. BALLIRO: I might say this, Your Honor, that as far as the plaintiffs are concerned we are admitting -- we are not going to be suggesting that any of the doctor's statements contained in the requests for admissions are prejudicial to the plaintiffs.

JUDGE ALDRICH: We are talking about Dr. Zupnick and not Dr. Nadelson.

MR. BALLIRO: In the requests for admissions there are many quotations from Dr. Nadelson's works.

JUDGE ALDRICH: It still might follow that they would like to have something that may be documentary.

MR. BALLIRO: I merely want to point that out, Your Honor. Thank you, Doctor.

Your Honor, that completes the evidence on behalf of the plaintiffs.

JUDGE ALDRICH: We will take the morning recess.

(Recess)

JUDGE ALDRICH: You may proceed.

JUDGE FREEDMAN: You have two witnesses, Mr. Cole?

MR. COLE: We have two witnesses. The first witness is Dr. Sprague Hazard and Dr. Krug will be here after the lunch recess.

JUDGE FREEDMAN: Just to look ahead, do the intervenors have witnesses in addition?

[113] MR. RILEY: No, we do not, Your Honor.

JUDGE ALDRICH: All right.

MR. COLE: The defendants call Dr. Sprague Hazard.

* * * * * * * *

SPRAGUE W. HAZARD (SWORN)

DIRECT EXAMINATION BY MR. COLE

Q What is your name, sir?

A Sprague W. Hazard.

Q Where do you live?

A Deerfield, Massachusetts.

Q Are you a licensed physician to practice medicine in the Commonwealth of Massachusetts?

A I am.

Q Dr. Hazard, would you review for the Court, please, your

undergraduate education, where you went to college?

A I am a graduate of the University of Rhode Island, Kingston, Rhode Island.

Q Where did you attend medical school?

A I went to the College of Physicians and Surgeons, Columbia University, in New York City.

Q When was that, sir? When did you graduate?

A I graduated in 1941.

Q Since 1941 have you been engaged in the practice of medicine?

[114] A I have.

Q Would you review for the Court your post-graduate training?

A Following four years of service as a medical officer, I undertook my post-graduate training in pediatrics at the Children's Hospital Medical Center in Boston. Just prior to that I spent six months in

contagious diseases at the Charles V. Chapin Hospital in Providence, Rhode Island. I spent a total of three and a half years in post-graduate training.

Q After you completed your post-graduate training what position did you assume?

A I went into the private practice of pediatrics, in which I continued for the next 16 years, completing that in 1965.

Q Did you have occasion in 1965 to take a position at Brandeis University?

A I did. I went to Brandeis University as Director of University Health Services.

Q Would you tell the Court, please, first of all, how long you held that position, and, secondly, what were your obligations and duties in that position?

A I was at Brandeis University for just about an even ten years. I was administratively responsible for

developing a comprehensive health program for the undergraduate and graduate students. In addition, my interest [115] in the psychological development of young people, particularly at a time of great national turmoil in terms of the activism and radicalism that was going on in the community, I had certain additional responsibilities in that direction.

Q When you completed your service at Brandeis University, what position did you next take, Doctor?

A I then went out to Deerfield where I was anxious to work with the younger population and I am now director of the health program involving four independent secondary schools in the Deerfield Valley.

Q Are you a member of any medical societies or similar professional groups?

A Yes.

Q Would you recite your principal memberships?

A I am a member of the Massachusetts Medical Society, the Franklin District Medical Society, the one in which I live and work, and at the national level I am a member of the Society For Adolescent Medicine, the Canadian Pediatric Society, and my major emphasis, of course, is with the American Academy of Pediatrics with which I have been affiliated since 1951.

MR. COLE: If I may have the resume of Dr. Hazard marked as Defendants' Exhibit B for Identification?

MR. BALLIRO: I have no objection, Your Honor.

[116] MR. COLE: I move its admission.

JUDGE ALDRICH: It may be marked.

(Resume of Dr. Sprague W. Hazard marked Defendants' Exhibit B.)

Q I would like to turn your attention, Doctor, to your involvement with the American Academy of Pediatrics. Just to refresh my recollection, you have been a member of the Academy for how many years?

A About 25 years now.

Q Would you please tell the Court the nature of the Academy's interests?

A The academy has been the spokesman and advocate of children in this country since about 1933. It is an organization which has made a particular priority of being responsible for children and young people in contrast to being a supportive organization for its membership advancing the material well-being of its membership. Its emphasis has been on the health and welfare of children and young people.

JUDGE FREEDMAN: By "children" do you have a certain age limitation?

THE WITNESS: Yes. In 1972 the Academy indicated that its purview or its area of responsibility was from the moment of conception through 21 years of age.

JUDGE JULIAN: Sometimes you drop your voice [117] and your words become blurred.

Q Will you speak more directly into the microphone, please, Doctor?

A Unfortunately that is a trait of my voice. At any rate, the Academy of Pediatrics in 1972 made a public policy statement in which it indicated its purview was from the moment of conception of the fetus through 21 years of age. Prior to that time it had been traditionally associated with childhood through 12 years of age and then disengaged.

Q Doctor, the Academy has a Committee on Youth, is that correct?

A It does.

Q Will you tell the Court, please, why it does and what the Committee's responsibilities are?

A The first interest of the Academy of Pediatrics became the welfare of young people and this began probably in the late fifties with the appointment of a Committee on Juvenile Delinquency, and this continued for several years. In the early sixties this was reorganized to be a Committee on Youth. This is a committee that is appointed by the Executive Board of the Academy. It chooses people from various geographical sections of the country who have indicated by their record to have special knowledge and interest in the well being of young people.

[118] I was appointed to the Committee on Youth in 1965 and was a member of it for the next nine years. For the first six years I was a member and then become Chairman for the last three years.

Q Passing now to the period beginning around 1970-1972, did the Committee on Youth have occasion to consider the problems related to minors having the ability to consent to health care services.

A Yes, it did.

Q Would you tell the Court, please, why the Committee turned to consideration of that issue?

A As I mentioned earlier in my testimony, the Academy of Pediatrics and the Committee on Youth in particular were increasingly concerned about the circumstances in the community as far as these circumstances affected the health and well being of young people. It was a period of alienation in the community, activism and radiacalism taking place at that time, and the position young people put themselves into where they had a change in life styles, and this brought a whole series of new health

issues, the issue of infection, the issue of sexuality which came to the surface at that time, and this required a response of an organization like ours showing an increasing sense of responsibility towards this group.

[119] It was apparent that the young people were doing something about this themselves in the creation of free clinics and alternative kinds of health care which were not within the usual areas of responsibility of the organized community, if you please. It was because of this that recognizing young people with their estrangement from their families, runaway groups, and so forth, that they did not have access to health care, and we felt that changes should be brought about, and these appeared, first, in the area of permitting young people who were involved with drugs to seek health care without transmitting this information to families or

others, and then the area of venereal disease cropped up in some of the States, and it was felt that there were other health issues which young people would not take care of if they couldn't go and take care of it on their own without having to communicate with their families.

On this basis the Model Act for the consent of minors was developed with the hope that this would influence the States to this very serious health issue. There were about 40 million young people in the community, many of which did not have a health care arrangement.

Q Dr. Hazard, you mentioned in your testimony a Model Act which the Committee on Youth developed. I would like to show you a document and ask if you recognize it.

[120] A Yes, I do.

Q What is this?

A The Model Act providing for consent of minors for health services.

MR. COLE: I would like to have this marked for identification.

(Model Act of Committee on Youth re consent of minors for health services marked Defendants' Exhibit C for Identification.)

Q Do you have a copy of it there, Doctor?

JUDGE FREEDMAN: The doctor has indicated that it is in his head and he doesn't need it.

THE WITNESS: I have looked at it before.

Q Doctor, we might just step back for a moment and review the membership on the Committee on Youth at the time at which this Model Act was developed by the Committee on Youth. Who were the people and what were their backgrounds?

A I was Chairman of the Committee at that time and you have my background. Dr. Robert Allen was a pediatrician in California and he was Director of University Health Services at the University of California at San Diego. Dr. Victor Eisner was at the School of Public Health, Berkeley, California, the University of California at Berkeley, and was associate professor at the School of [121] Public Health. Dr. Dale Garrell was a pediatrician who at that time was Chief of Service at Mount Sinai Hospital in San Francisco, California. Dr. Hammar was Chief of Adolescent Medicine at the University of Washington in Seattle. Dr. Thomas Shaffer was at that time Chief of Adolescent Medicine at Ohio State University in Columbus. Dr. Jerome Schen was a private practitioner of adolescent medicine in St. Louis. He was also associate clinical professor

of pediatrics and adolescent medicine at St. Louis University. Dr. Natalia Tanner was a private practitioner in Detroit, Michigan and she was also an assistant professor of pediatrics at Wayne State University, and John Alan Welty came from a small town in southern Texas, Hollington, Texas, where he was a private practitioner in Hollington, Texas.

These people represented not only a geographical spread around the country with some weight towards the West Coast but they represented the academic background as well as the private practice model.

Q Doctor, did the Committee on Youth have occasion to meet several times to consider various drafts and proposals of this Model Act?

A Yes.

Q How many times would you say the Committee met to do that work roughly?

[122] A I would say probably five or six times.

Q Did you attend the majority of those meetings?

A I attended all of them.

JUDGE FREEDMAN: Over how long a period?

THE WITNESS: Over a two year period. I think it should be stated that there were innumerable telephone calls and a great deal of correspondence as well.

Q When did the Committee on Youth finalize its version of the Model Act?

A This was finalized in a meeting in Los Angeles in June of 1972.

Q What next occurred after the Committee finalized its version of the act?

A Then there was the inevitable editorializing and smooth writing that a professional editor did for us, and it was finally published in

Pediatrics, the official journal of the American Academy Of Pediatrics in February, 1973.

Q Is it correct that it appears in Volume 51 of Pediatrics at Page 293?

A Yes.

Q Was there any kind of other approval either by the American Academy itself or its Council on Child Health which this Model Act received?

A Before any document such as this can go before the [123] Executive Board of the Academy, which grants final approval, it has to be passed by another structure within the Academy called the Council on Child Health, and they review the document and its appropriateness, makes corrections or suggestions, and then it goes back to the Committee and may be partially rewritten, and so forth, and then goes back to the Council again, the final draft goes to them, and then it has to go to the executive board where it has

receive final approval before it becomes an official document of the Academy of Pediatrics.

Q And this document went through those steps?

A It did.

Q And received approval and is therefore an official document of the American Academy of Pediatrics.

A Yes, it is.

Q Doctor, will you describe to the Court the basic structure of the statute concentrating, if you would, please, on its general rule concerning the consent of minors to health care?

MR. BALLIRO: Your Honor, I respectfully, Your Honor, would think that the document would speak for itself in that regard.

JUDGE ALDRICH: I would have thought so.

MR. COLE: I am prepared to offer it, Your Honor, at this point and it will speak for itself.

[124] MR. MEYER: I have no objection, Your Honor.

JUDGE ALDRICH: Exhibit C.

(Defendants' Exhibit C for Identification received in evidence.)

Q Doctor, turning your attention now to Defendants' Exhibit C, which is the model statute, I call your attention to Section 6 which reads, "Self-consent of minors shall not apply to a sterilization or abortion". Would you tell us, please, Doctor, why the Committee on Youth of the American Academy of Pediatrics determined that the provisions of the Model Act should not apply to sterilization or abortion?

A To preface my remarks in response to your question, I feel it is my responsibility to tell the Court that this was a point of great debate

in the development of this document, that there were members of the Committee who felt that this section should not be included, rather that minors should have the right of consent with regard to sterilization and abortion and there were others who felt otherwise.

A great deal of consultation went on with other members of the Academy outside the Committee, beyond this particular group, in coming to this conclusion. However, at the time that the final draft was made the entire Committee was in agreement that this should be [125] the position that would be recommended to the Academy of Pediatrics as an organization representing itself on this point to the community-at-large.

Q Would you give the Court some specific examples of the nature of the controversy, the views of the individual committee members and how

this was resolved ultimately in this version of the Act which is now in evidence?

A Well, as in all groups considering this point, there is the all or none group and on the opposite side the more conservative, morally oriented, ethically considerate group, who felt that this part should be a family decision as much as is possible rather than a decision of a minor. And I would guess or would say that this was the range of decision that went on over this point.

The ultimate viewpoint of the Committee was that in most instances the well being of the minor involved in the pregnancy, the girl involved in the pregnancy, the best hopes for her future, the best hopes for the family as an effective unit, including this girl, were such that this particular health issue should be shared with the family.

I think this is my answer.

Q Turning more directly to a narrow alternative in the statute, I note that the statute does permit two physicians in certain instances to concur in a treatment program for [126] the adolescent or minor but that this was not an alternative of choice as to abortion or sterilization. Would you tell the Court why the Committee did not feel the views of two physicians would be adequate safeguards in this area of abortion and sterilization?

A It has been presented earlier this morning by the deposition of Dr. Nadelson that indeed there are going to be circumstances where others -- can you hear me?

JUDGE FREEDMAN: Go ahead.

A (Continuing) -- others are going to have to participate in this decision besides the family.

MR. BALLIRO: Respectfully, Your Honor, I object. I would suggest that the preface indicates that his answer is going to be argumentative.

JUDGE ALDRICH: I suppose he has a right to express an opinion.

MR. BALLIRO: Well, I don't take it that he is now expressing an opinion, Your Honor. I take it that he is now going to distinguish his testimony from the views expressed by Dr. Nadelson in her deposition, if I understand what he is saying.

JUDGE ALDRICH; Why shouldn't he?

MR. BALLIRO: It is not responsive to the question, first of all, and in this form it is argumentative.

JUDGE ALDRICH: Let's get to the meat. Why [127] shouldn't he express an opinion?

MR. BALLIRO: I do not have any objection to his expressing a different opinion. I am merely saying that in the manner in which he is doing it it is in an argumentative way.

JUDGE ALDRICH: I don't follow you.

JUDGE JULIAN: I don't follow you.

JUDGE ALDRICH: All opinions are argumentative, aren't they?

JUDGE JULIAN: Otherwise it would be a fact and not an opinion.

MR. BALLIRO: Well, I do not have any strong objection, Your Honor.

JUDGE ALDRICH: All right.

Q You may answer.

JUDGE ALDRICH: I think it would be best if it were responsive to the question. I think I agree with Mr. Balliro on that.

Q Would you, Dr. Hazard, tell the Court, please, why the Committee determined that the safeguard of two physicians' consent and which the Committee determined was sufficient in the cases of most medical and surgical procedures and would not be sufficient in the case of an abortion and sterilization, and in responding to

the question, please state why the Committee felt this way and we will get to [128] your opinion later on.

A Thank you. I thought I was in trouble when I mentioned Dr. Nadelson's name anyway.

I would like to repeat what I said earlier that it was the opinion of the Committee that the best chances for the adolescent girl who was pregnant for her future and for that of the family would be if this particular information were shared with them. I think it is to that effect that I responded.

JUDGE FREEDMAN: Did the Academy or the Committee of the Academy have evidence to support that conclusion, case studies either way, before reaching that conclusion?

THE WITNESS: I think this conclusion was based on the experience of members of the Committee, and certain basic contentions of the

Academy, of the importance of the family unit, particularly at a time of crisis, i.e., the pregnancy of a daughter, and the contention was that indeed if this could be handled this way, it often was effective in bringing the family back together and strengthening relationships between parents and daughter.

Q Dr. Hazard, in your own professional opinion as a pediatrician, a person particularly concerned over the years with the welfare of minors and adolescents, do you [129] yourself have an opinion as to the appropriateness, the sound professional judgment, in the nature of professional judgment in this case of this statute's exemption of abortion and sterilization procedures from its general rule of the minor's ability to consent to health care services represents?

JUDGE FREEDMAN: Are you talking about this statute?

MR. MEYER: This statute.

Q Do you have an opinion as to that matter?

A I do.

Q What is that opinion?

MR. BALLIRO: I object.

JUDGE ALDRICH: I will take it. You may well persuade us it is irrelevant, but I will hear it or we will hear it.

A It is my opinion that in the adolescent, particularly the young adolescent who is in the midst of her important psycho-sexual development that she needs dependable resources to resolve some of the issues associated with her current situation, i.e., her pregnancy and the possible interruption of it.

She certainly needs an opportunity to be heard with respect to those circumstances that led to her pregnancy.

[130] The issues of counselling have been brought out, and certainly the return of this girl to her family and the resolution of the differences which may or may not be related to the pregnancy itself, should be worked out.

There is a point which I would like to emphasize as well with this rhetorical observation and that is how important it is for parents to have counselling at this time, too. Their feelings of anger, and of guilt, their feelings of what they went through as adolescents themselves need to be talked out in order to be able to properly support and encourage this girl and hopefully get her back into the mainstream of successful development as an adolescent.

MR. BALLIRO: Respectfully, Your Honor, I object and ask that that portion of the witness' answer that has to do with the need for parents'

counselling be stricken. I would suggest it is not relevant to the question asked.

JUDGE ALDRICH: Well, we will let it stand for the time being.

MR. MEYER: We have no further questions, Your Honor.

JUDGE ALDRICH: Thank you.

JUDGE FREEDMAN: Doctor, I have one question. [131] Was it the intent of the Academy in promoting the Act and hoping that the Act would be carried forward into execution more in line with the preservation of the family unit or the health of the child both physically and psychologically?

THE WITNESS: The prefactory note in it indicates both. There was a need to be able to respond to the health issues involving the minor. At the same time there was equal emphasis expressed in the prefatory note about the importance of the family in relationship to the health of the young people.

JUDGE ALDRICH: You said there was disagreement on the Committee at one time. Did that express your particular view?

THE WITNESS: No, it did not, no. My particular view was the importance in trying to preserve or rebuild family integrity and a health issue might be the basis for it.

JUDGE ALDRICH: Thank you. Mr. Riley, do you have any questions?

MR. RILEY: No, Your Honor.

JUDGE ALDRICH: Mr. Balliro.

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[132] CROSS-EXAMINATION BY MR. BALLIRO

Q Dr. Hazard, as I understand your testimony it was not until the year 1972 that the American Academy of Pediatrics decided that its goal should include concern with persons from the age of birth until 21 years of age; is that correct?

A As a national policy or an expressed policy of the organization, it had made a considerable investment in the well being, the health and welfare of young people, probably for about 12 to 14 years.

Q You testified on direct examination that up until that time, 1972, the Academy concerned itself with children up to 12 years of age.

A As an official policy, yes.

Q And that concern, I take it, did not involve to any substantial or material extent the pregnancy of adolescents up to 12 years of age?

A May I respond to that?

Q Please do.

A In 1970 or 1971 the Academy put out a statement on the role of the pediatrician and the pregnant adolescent girl. This is an official document that I have a copy of. It went through the several sequences that I spoke to you about and it was

an expressed policy about the responsibility of the pediatrician who was caring for the [133] young adolescent patient who found herself pregnant. So this policy had been well established and expressed before.

The statement to which I refer was a combined expression in the sense of the American College of Obstetricians and Gynecologists and the American Academy of Pediatrics when it was published.

Q Did that paper concern itself with the pregnancies of women up to the age of 21?

A It did not express an age as such. It spoke in terms of adolescent girls.

Q Was that the only paper published by the American Academy of Pediatrics concerning adolescent pregnancies?

A As far as I can recall it was.

Q So that it is fair to say, is it not, that insofar as it being a major or a substantial concern of the American Academy of Pediatrics its interest in adolescent pregnancy is relatively new?

A You are right.

Q Now directing your attention particularly to the Model Act that has been introduced in evidence, when was it you began holding committee meetings with respect to that Model Act?

A I can only approximate that, but I think it was in a January meeting in 1971 when the discussion started: [134] should we try to develop a Model Act?

Q You indicated in your direct testimony, Doctor, that the process of meetings took place over about a two year period of time?

A That's correct.

Q And that in June of 1972 for all practical purposes the Act had been drafted and from that point on it went through only those channels that were necessary to polish up the language?

A Yes.

Q So is it fair to say that the five or six committee meetings that you refer to that went into the preparation of this Act began sometime in 1970, some two years or so prior to June of 1972?

A I regret that I can not date it.

Q I am not going to ask you to date it with certainty, Doctor.

A I have documentation back in my bag there.

Q Do you want to change your testimony that it took place, the preparation of this Model Act, over approximately a two-year period of time?

A I am satisfied with two years.

Q What would you change your testimony to?

A I think that if you are asking me to give the exact date as to when this first took place, I can not do that.

[135] Q I won't ask you for the exact date, Doctor. I will frame another question for you, Doctor. What is your best memory as to when the Committee was first organized?

A Which Committee do you refer to?

Q The Committee that led to the Model Act providing for consent of minors for health service.

A This Committee was first organized in 1962. The Committee on Youth was organized in 1962.

Q At some time you became Chairman of the Committee on Youth. I would assume that a subcommittee or

the like was specifically designated to prepare a Model Act, is that correct?

A You have given me an important landmark to go by.

Q Fine.

A I became Chairman of this Committee in October of 1971 and I was Chairman for the next three years, until October of 1974, when I retired from the Committee to go on the Executive Board of the Academy.

Q Having in mind that you became Chairman of this Committee in October of 1971, were you aware when you became Chairman of any committee meetings or the compilation of data or work that had been done that went into the final draft that became this Act?

A This was one of the first agenda items we took up when I was Chairman.

[136] Q In October of 1971?

A Correct.

Q Having in mind that it is your testimony that for all practical purposes the final draft was completed in June of 1972, is it now fair to estimate that the time that was spent in preparing this Model Act took place over approximately an eight or nine month period of time?

A I would think you are correct, yes.

Q And all of that period of time was before abortion was declared legal by the United States Supreme Court, isn't that correct?

JUDGE JULIAN: What was the date?

Q Do you have any knowledge when the United States Supreme Court spoke out with respect to the legality of abortion?

A I do not.

Q If I suggest to you it was on January 23, 1973, would that help refresh your memory?

A I would have no reason not to accept that.

Q Is it fair to suggest to you, Dr. Hazard, that in preparing this Model Act providing for consent of minors for health services, and with respect to that part that has to do with abortion and sterilization of minors, that a primary or the major factor in the Committee's mind was the fact that at that time abortions were not legal?

[137] MR. COLE: Objection. Abortions were quite legal at that time.

JUDGE ALDRICH: I think that is so.

MR. BALLIRO: Well, legal in the sense --

JUDGE JULIAN: What was the date of the Opinion?

MR. BALLIRO: January 23, 1973, Your Honor.

MR. COLE: As we all know, the question that the Court considered was not whether abortions were legal --

JUDGE ALDRICH: Your objection is sustained.

Q To what extent, Dr. Hazard, did the Committee take into consideration in expressing its view with respect to the availability of legal abortions to minors?

A It was readily apparent to the Committee that abortions were being carried out on minors in various sections of the country, and I think this was one of the issues that they did feel they had a responsibility toward and the fact that there were attendant serious consequences.

JUDGE ALDRICH: Excuse me. You said they were carried out. But they were carried out by reputable doctors in hospitals or were you including undercover abortions?

THE WITNESS: I think the majority were being done under circumstances other than in recognized health organizations.

[138] JUDGE ALDRICH: I thought that is what you meant.

Q You testified on direct examination, Doctor, that the Committee met some five or six times; is that correct?

A Yes.

Q When was the first meeting?

A The first meeting at which I was Chairman was October of 1971. The next was in January, and the next meeting was in May and the next meeting was in June.

Q You have now described four meetings.

A Four meetings.

Q So you want to change your testimony --

JUDGE ALDRICH: No. He has not finished.

MR. BALLIRO: I am sorry. I thought he had, Your Honor.

A Then it went before the Council on Child Health in July of that year. I was a member of the

Council on Child Health, at which time there was need for some persuasion and for minor changes and it went back to the Committee but the final changes were not based on a formal Committee meeting, but based upon the mail and telephone.

Q So far as meetings between yourself as Chairman and the eight other members of the Committee whose names you have recited and whose names appear on the exhibit, it is [139] fair to say there were four meetings --

A That is correct.

Q -- that led to what was substantially the final draft of the Model Act?

A That is correct.

Q Where did the first meeting take place?

A Where?

Q Yes.

A I don't recall. The first meeting takes place during the annual meeting. I don't remember where it

was in 1971. I can document this if you wish.

Q Was it in a city other than Boston?

A Oh, yes.

Q Somewhere in the middle west of the country?

A The annual meeting of the Academy moved from Chicago to New York City -- from Chicago to San Francisco and then back and forth across the country. Where it was in October, 1971 I don't recall.

Q But, at any rate, the first meeting you referred to as taking place in October took place at the annual meeting?

A Correct.

Q How many days do your annual meetings take?

A The plenary sessions run four days. There are additional sessions that extend from six to seven days.

Q Did it fall upon your role as Chairman of the Committee [140] to designate or to appoint who the Committee members were going to be?

A The Committee members were appointed by the Executive Board of the Academy.

Q With respect to this Committee when did the Executive Board of the Academy make the appointments of the Committee members?

A This would be something that I can't recall in detail. I would say this, that each Committee member is appointed for a period of three years, at which time a decision is made whether to reappoint this individual for another term of three years or not.

Q Were the appointments to your Committee made at the annual meeting in October, 1971?

A The appointment process begins in the early spring or it did at that time and a list is prepared by

a special committee on committees and it is presented to the Executive Board for their consideration. At that time the committees were appointed in July of the preceding year at the annual meeting.

Q These members, including yourself as Chairman, took office at the October annual meeting of the Academy?

A That is correct.

Q Were all of the members of the Committee present at that annual meeting in October of 1971?

[141] A I can't recall that.

Q Is it likely that they were?

A It is likely they were all not there.

A Do you have any memory as to how many members of the Committee were not there at this meeting in October, 1971?

A I wouldn't have any way of remembering that. I do not know that

attendance at the annual meeting is not apt to be a full committee meeting.

MR. COLE: Your Honor, I will wait for the next question but --

JUDGE ALDRICH: Are you suggesting that we are putting a lot of time into this?

MR. COLE: Yes, Your Honor.

JUDGE ALDRICH: I would agree.

MR. COLE: That was the nature of my objection. I do not see its relevance.

JUDGE ALDRICH: It may be relevant, but it seems to me, Mr. Balliro, unless you have something specific --

MR. BALLIRO: Well, Your Honor, the weight, of course, is for the Court.

JUDGE ALDRICH: I know. But how many members were present at what time and so forth, I can't think of much grist left in the mill.

[142] MR. BALLIRO: I would like to go into this very briefly, Your Honor.

JUDGE ALDRICH: All right.

Q How long did the first meeting last?

A Well, these were brief Committee meetings and I dare say three hours.

Q Would you say that was so with respect to the January, the May and June meetings as well?

A No. These are workshop meetings and go on for two full days.

Q And the October meeting?

A No. The workshop meetings go on for two days.

JUDGE ALDRICH: Subsequent to October?

THE WITNESS: Yes.

Q So in toto how many hours of Committee meetings would you say were spent in the preparation of this Act?

A If you are referring to the time when we were all together, that is one thing. If you are talking about the time spent on this document, that is an entirely different thing.

Q As far as you all being together -- ?

A Well, eight or nine hour days when we would meet -- I would suppose 50 or 60 hours. But this represents just a modest contribution to the ultimate document. Work was done at home.

[143] Q Am I correct in assuming, Doctor, that in selecting yourself as Chairman --

A I was not selected by myself. I was appointed by the Board.

Q I'm sorry. In your being appointed Chairman of that Committee and with respect to the appointments of the other Committee members, the fact of your or their particular experience with respect to adolescent pregnancy was not a major factor?

A I do not agree with that.

Q Will you tell us to what extent and the degree to which you were aware either your experience with pregnant adolescents or those of the other committeemen were taken into consideration by the Executive Committee when they made the appointments?

These nine members of the Committee were not appointed to the Committee because they had particular experience in adolescent pregnancy. I would no way hold that as a basis for appointment. They were appointed because of their extensive recognized experience with the health needs of young people.

Q I assume you yourself had not had much acquaintanceship or contact with adolescent pregnancy.

A That is correct, only as a Director of University Health Services.

[144] Q In a very general way?

A Well, as a resource for young people who had become pregnant and who were in college. That is not a very general way, but a specific way.

Q Have you had the opportunity of counselling youngsters, teenagers that were pregnant?

A Indeed.

Q Over how long a period of time?

A This was during the period that I was at Brandeis over a ten year period of time.

Q How old were the teenagers that you were counselling?

A Well, the teenagers would be from 17 up and the young adults about 24. That is a different age group than I am working with now.

Q Can you tell us with respect to each of the doctors whose names appear on the Committee what you know of their particular experience with respect to treatment or counselling of pregnant adolescents?

A Well, Dr. Eisner is one who was in an academic posture where he would have no opportunity.

Q Do you know of your own knowledge that they had experience in the treatment and consultation of adolescents that were pregnant?

A I have no reason to believe that not every one of them had experience.

[145] Q What knowledge so you have of their having has experience?

A What they had related at Committee meetings as to the experience that they had had. I do not have any documentation of this -- whether this was their first or their third pregnancy.

Q Doctor, your experience principally has been with the health concern of young people in colleges or schools, is that correct?

A Since 1965. Prior to that time my experience was with general

pediatrics and younger children by and large.

Q And as a result of that experience can you give us an opinion as to the extent to which teenagers were reluctant to discuss with their parents problems having to do with their use of drugs?

A I could not give you any specific data on that.

MR. COLE: Your Honor, I move that go out on relevancy grounds. There has no discussion of drugs.

MR. BALLIRO: This is preliminary, Your Honor.

JUDGE ALDRICH: It would seem to me to be a valid preliminary. We are testing the experience and capacity of this witness.

MR. COLE: Yes, Your Honor.

MR. BALLIRO: I will rephrase the question.

JUDGE ALDRICH: We will take the question. He said he couldn't answer it. Go ahead.

[146].Q Doctor, from your experience can you give us an opinion as to whether or not generally speaking adolescents who become involved with the use of drugs are or are not willing and anxious to discuss those matters with their parents?

A At first approach it would be my opinion that they would be reluctant to discuss it with their parents. I would like to respond further to that.

Depending upon the care situation in which they find themselves --

JUDGE FREEDMAN: The what kind of care?

THE WITNESS: The care situation that they find themselves in, the interests and the skills of those caring for them in this particular situation, it would be my opinion that sharing this information with parents and reviewing the background of it, how they become involved, and the

extent to which they became involved and whether indeed there were family dynamics which might influence their involvement in drugs could better be attended to.

JUDGE ALDRICH: Could what?

THE WITNESS: Could better be attended to.

JUDGE ALDRICH: Is that responsive to the question?

MR. BALLIRO: Perhaps I had better put the [147] question again.

JUDGE ALDRICH: The question is not whether it would be better if they did. The question is whether they did.

THE WITNESS: At the first visit they are reluctant to share it with the parents.

JUDGE ALDRICH: And then later did you mean they became persuaded to discuss it?

THE WITNESS: Yes.

Q In all cases?

A No, I wouldn't say in all cases.

Q Would there still be a substantial percentage of cases where after counselling the adolescent expressed a great deal of reluctance to discuss the matter of a drug problem with their parents?

A I have no data to support that. It would be my impression that the success in getting adolescents to share their involvement with drugs would not be very high.

Q It would be your impression that they would be reluctant?

A Reluctant.

Q Would your opinion be the same with respect to the adolescent's desire or willingness or eagerness to discuss a problem of venereal disease with their parents?

A I think that they would be reluctant to discuss this with their parents.

[148] Q How about a pregnant adolescent? Do you have an opinion as to the extent to which a pregnant adolescent would be reluctant to discuss the matter of that pregnancy with her parents?

A I don't know what it is you are trying to get me to say. I would qualify your question by saying that at first contact adolescent girls are reluctant to discuss it with their parents.

Q Is it fair to say that with careful counselling a great number of those would then discuss it with their parents?

A Yes.

Q But there would still be a substantial number who would be reluctant to do so?

A Yes, sir.

Q As I understand your testimony, Doctor, you say that the ultimate view of the Committee was to

take the position that is described in Section 6 with respect to self-consent of minors as not applying to sterilization or abortion. That was the ultimate view, is that correct?

A Yes, it was.

Q Is it not fair to say that the reason to some extent for that ultimate view was so that a united view could be presented to the community?

A I don't think the Committee made its decision based on future public relations of this statement, but rather [149] that it was an educational process as we developed this and it was the considered opinion of the entire Committee that this should be the viewpoint.

Q You had a committee of yourself and eight other doctors. Is it not fair to say that that Committee like most committees made compromises with respect to the way that the Act

was ultimately to read or what in substance it was to contain?

A Is that a question?

Q Yes.

A I would agree that it is inevitable that compromises are made when preparing a document like this.

Q And was it not so, Doctor, that some of the compromises that were made was for some of the Committee members to surrender their view that a minor ought to be able to give informed consent to the question of abortion?

A This opinion was expressed.

Q And compromises were made?

A They were.

Q Is it fair to say that to a substantial extent the compromises were made that resulted in the adoption of Section 6 because it was the unanimous opinion of the Committee that the best chances for the pregnant adolescent was to share the experience

and the concern and what ought to be done with the family?

[150] A Correct.

MR. BALLIRO: That is all.

JUDGE ALDRICH: Is there any re-direct?

MR. COLE: I have just a few questions, Your Honor.

* * * * * * * *

RE-DIRECT EXAMINATION BY MR. COLE

Q Dr. Hazard, at one point in your testimony of cross-examination you were asked questions concerning the time which the Committee on Youth and members of the Committee devoted to the production of this document. Do you recall that testimony?

A I do.

Q Would you add the other part of your testimony, that is to say, you were asked a question about how much

time was spent at Committee meetings and I believe you answered something like 50 or 60 hours?

A Correct.

Q Did members of the Committee spend any additional time among themselves, over the telephone or through the mail, developing their views and the wording of the statute?

A I would like to respond to that in this way, that one has to look at the experiences and the observations of these Committee members over the preceding years [151] during the period of great turmoil involving the health and well being of young people.

MR. BALLIRO: I object to that answer and ask that it be stricken.

JUDGE ALDRICH: Mr. Cole?

Q Doctor, could you answer the question first and then we could go back to see if we need to give some additional elucidation.

A Would you restate the question?

Q The question was in addition to the time that the Committee members spent in Committee meetings which you testified was approximately or probably was 50 or 60 hours, do you know approximately how much time the individual members spent themselves either through the mail or on the telephone or in small regional meetings, any conversations or deliberations in which they engaged concerning this Model Act?

A I could in no way give you any time. Again if my response is inappropriate, say so.

Q I will rephrase the question and ask you this. Can you tell us of your own experience how much time you yourself as a member of the Committee on Youth devoted to the Act outside of Committee meetings, and I don't mean exactly, but simply your best judgment over a period of months.

[152] A I couldn't generalize beyond saying a great deal of time or someone asking me how I was able to hold down a job and work on this, too and comments like that. It took an enormous amount of time.

Q It took an enormous amount of time?

A Yes.

Q You were asked some questions about the willingness of adolescents facing various types of medical problems, drug abuse, venereal desease, pregnancy, to be willing to discuss their problems with their parents, and I believe your testimony was at one point that at first contact a fair number or a large number would not be willing to discuss it and that the number became less as counselling on health and care was supplied to the adolescent, but at the end there might be, I believe you used the words substantial number of adolescents who

would nonetheless refuse to consult their parents.

Will you give us a better idea of what you meant by substantial number?

A To avoid any misunderstanding, I have no statistical data to say what this percentage would be. It depends again on what environment you were working in, what particular culture group you are working with, whether you are working in a suburban area, the sophistication of the young person or family. The answer varies for [153] each group. I do think the best chances take place when there is a humanistic environment for this exchange between the young person and the counsellor.

MR. COLE: Thank you, Doctor.

* * * * * * * *

RE-CROSS EXAMINATION BY MR. BALLIRO

Q Would you consider the courtroom a humanistic environment for the discussion of or counselling of a pregnant adolescent with respect to the issue of abortion, Doctor?

A The matter of privacy and confidentiality enters into the very core of the success of the counselling.

Q Let us assume in your answer to that to the extent that it is possible the proceedings are not held in a public courtroom but they are a matter of record with a stenographer, but other than that they are more or less private. Would you consider the courtroom environment a humanistic one?

JUDGE JULIAN: Are you talking about a courtroom or chambers?

MR. BALLIRO: As privately as it could be made, Your Honor.

JUDGE JULIAN: You had referred to courtroom.

MR. BALLIRO: Even chambers.

Q Would you consider that a humanistic environment?

A I can think of many instances in which I would not [154] think it humanistic. I think it might be possible to have the kinds of people there who would create a humanistic environment, particularly if there was an advocate for the young person and if the young person fully understood what was being expected of him and what was being shared.

JUDGE ALDRICH: Would you include in that, Doctor, whether or not the young person had a surrogate, the young person's parents are present in the courtroom opposing the young person's wishes?

THE WITNESS: Well, I am not quite sure of the question you have asked.

JUDGE ALDRICH: Well, the court proceedings that we are assuming in this case to take place are

proceedings that occur only after the parents have refused to give the consent to the minor but nonetheless the parents are present and would state that to the judge that the minor's consent be recognized.

THE WITNESS: It would be my hope that the child would have qualified counsel, for one thing, and secondly, that there be a separate person who would be recognized as the advocate of the child.

MR. BALLIRO: I don't think that answer is responsive respectfully, Your Honor.

JUDGE ALDRICH: Well, it's a good start. [155] Assuming that the child has both a lawyer and a friend, which is a big assumption because I doubt whether the child would have both, from my contact with the best of all possible worlds.

THE WITNESS: In response to your last remarks I would hope that society

would recognize the gravity of the situation to see that such a structure was available.

JUDGE ALDRICH: I think we would all hope that, but let's assume the practicalities of the situation and that the child would have counsel, and I would assume competent counsel, and that the judge is the kind of judge that you see in the three judges before you, how humanistic is that going to be in light of the fact that the parents are unalterably opposed?

THE WITNESS: I have difficulty with the term humanistic.

JUDGE ALDRICH: You used it.

THE WITNESS: I used it because it has real meaning when I use it. I would hope that there would be equal support of the child as of the family.

Q Would you say, Doctor, that the fact the child is well represented but nonetheless is engaged in a heated adversary situation with her parents

that it would then provide a humanistic, what you would consider to be a [156] humanistic environment?

MR. RILEY: Objection.

JUDGE ALDRICH: Do you object to the word "heated"?

MR. RILEY: Yes, Your Honor.

JUDGE ALDRICH: That goes out.

MR. RILEY: The statute says that the parents would only consider her best interests. Therefore, the issue would not be unalterably opposed.

JUDGE ALDRICH: Well, in the first place, the statute doesn't say that, a problem we will deal with later.

In the second place, even if the statute said it, I am sure you are going to contend that every parent will do that.

MR. RILEY: If we are going to assume a benign situation --

JUDGE ALDRICH: The benign situation relates to the court procedure, not that all parents are

benign because that would be a ridiculous assumption.

Q You do understand, Doctor, that we are speaking about an adversary process?

A I do.

Q Where the parents are unalterably opposed to the abortion and where the adolescent has been forced, because she [157] wants an abortion, to bring a complaint in court and ask the Court for assistance in that regard?

A I understand.

Q Do you say under any circumstances that could be a humanistic environment within your meaning of the term humanistic?

A My response is that if things have arrived at this point, I would hope that the Court environment would be as humanistic as possible.

Q You would hope that. You recognize that is not likely that it is going to be very humanistic?

A It is quite apparent from your description of the situation that the child has become a pawn in the situation.

Q And would suffer severe psychological trauma as the result of that kind of a situation?

A She might.

Q In all likelihood, is that correct, Doctor?

A I would hope again that the conduct of affairs at that particular time, if they arrived at that point, could be resolved in a way that might well be not necessarily a psychological crisis for the child.

Q We would all hope that, Doctor, but what in your opinion is the more likely result with respect to psychological impact on the pregnant adolescent?

A I think it would be an unfortunate experience.

[158] MR. BALLIRO: That is all I have, Your Honor.

MR. COLE: May I have re-direct on that issue, Your Honor?

JUDGE ALDRICH: You may.

* * * * * * * *

RE-DIRECT EXAMINATION BY MR. COLE

Q Dr. Hazard, you have been asked to assume a hypothetical situation and you have answered some questions and given some opinions on the basis of those assumptions, and I would like to give you another hypothetical situation and ask you to express an opinion as a consequence of that situation in an adolescent.

Would you assume, therefore, please, that a situation developed in which an adolescent, say, at the age of between 13 and 15 years of age, from a middle income family becomes

pregnant and is diagnosed by a physician as being pregnant, and seeks from him or her an abortion and is told before an abortion can be performed that the consent of her parents must be obtained. She tries to obtain the consent and the parents refuse.

The situation is one in which the parents sincerely believe that an abortion would not be in the best interests of that adolescent. The adolescent does not agree with the parents and leans to the other direction [159] and she goes back to the physician and asks him what to do. The physician informs her that there is relief available from this situation, that she can go to court with him and the proceedings will be private in the lobby of the Superior Court judge of the Commonwealth, at which there will be no other persons present save the stenographer, the

judge, the parents of the child and their counsel if they desire counsel, the physician, the adolescent, a lawyer for her and any witness that may or may not be relevant. The proceedings are secret in the sense that they are impounded, not publicized, and the judge has available to him whatever resources he desires concerning social counselling and psychiatric counselling which as a judge is always open to him and he understands the determination he must make on the case with facts before him: what is in the best interests of this child?

Now, given that hypothetical situation, Doctor, do you have an opinion as to the consequences of such a procedure?

MR. BALLIRO: I object to that question.

JUDGE ALDRICH: He may answer.

Q Do you have an opinion, Doctor?

A I do.

Q What is that opinion?

[160] A It seems to me that when affairs have reached this point where the relationship between the parents and the child have become a courtroom issue that I would have a lot of misgivings about the validity of the relationship between the parents and the child and how capable they are of being valid support for this child in the future.

It seems to me that the lines have been drawn in a way that are not productive as you have stated them. My opinion is that the adolescent child should have certain rights about her life and her body and what happens to it and this should be taken into consideration at that time.

Q Assuming that those issues were taken into consideration, Doctor, that is to say the judge was quite

concerned with the adolescent's rights and what would be in her best interests and how to advance those best interests, do you have an opinion as to what the consequences for that kind of procedure might be for the adolescent?

A The consequences, if the decision was made in favor of the child for quality family relationships are not good. The need for support on the part of the child would be abandoned at this point and the child would be abandoned at this point and her need for support would be great and again hopefully circumstances could be [161] developed whereby those kinds of supports could be developed.

Q Is that the essence of your concern then that this procedure --

JUDGE ALDRICH: I think the leading is uncalled for.

MR. COLE: I beg your pardon, Your Honor.

Q Will you tell us, Doctor, the basis of your concern for the lack of support for the child, why you feel the child would loose support?

A It would be my estimate that a family had been unable to resolve this except to go to a court setting were trying to express other rights on their own rather than take into consideration the whole needs of the child.

Q Is there any other mechanism that you might suggest in such a situation for providing the child and the family with the support it needs to heal the injury it may have suffered as a result of participation in such a procedure?

A I did speak to this point earlier and it was thought not to be relevant, but I think that the needs of the parents are very great under these circumstances in terms of working out their own problems so they can better be of help to their child.

Q Would you expand on that a little bit more, please?

[162] A I think the needs of the parents are to have counselling themselves for understanding their viewpoint, why they have this particular viewpoint, to take this health issue and expose it the way it has been described.

JUDGE FREEDMAN: Is that in the best interests of the parents or in the best interests of the child?

THE WITNESS: Ultimately in the best interests of the child.

MR. COLE: I have no further questions.

MR. RILEY: I have one question.

* * * * * * * *

RE-CROSS EXAMINATION BY MR. RILEY

Q Dr. Hazard --

JUDGE ALDRICH: Do you have just one question or do you have an extensive examination of the witness?

MR. RILEY: I have just one question directed at the point --

JUDGE ALDRICH: I can't hear you.

MR. RILEY: It would just be limited to the recent questions by Mr. Balliro and Mr. Cole.

JUDGE ALDRICH: You said one question.

MR. RILEY: I may have maybe two or three questions.

JUDGE ALDRICH: Very well.

Q Dr. Hazard, assume that a minor girl under the age of 18 [163] is unmarried and desires to have an abortion and her parents refuse to consent to that abortion because they don't feel it is in her best interests, and assume that a determination is made that the child is not capable of giving an informed consent to the abortion, and it is not

in her best interests, who would decide in that situation whether or not the child should have the abortion?

JUDGE ALDRICH: I don't understand that.

JUDGE JULIAN: Who would or should?

JUDGE ALDRICH: Under the statute --

MR. RILEY: If I may clarify?

Q Given that situation, if the parents refused to give consent to the abortion and a judge of the Superior Court refused to give consent to the abortion, is it your testimony that someone else should give consent to the abortion?

A I did not testify to that, no.

Q Would it be good medical practice for a doctor to permit the abortion to be performed?

JUDGE ALDRICH: After the judge had decided that it was not in the child's best interests?

MR. BALLIRO: He would be arrested.

MR. RILEY: In the alternative to a judge deciding that it is not in the child's best interests.

MR. BALLIRO: I object.

[164] JUDGE ALDRICH: Well, if the witness is not confused, I will state it for him. Judge Julian suggests you are confused. I am willing to accept the fact that I am confused. But surely either you are talking about the statute or you are talking about something else.

I understood you to use a hypothetical situation where the child was incapable of consenting, that the parents had decided it was in the child's best interests not to have an abortion and the judge had decided the same way. Then you are asking the witness what is to happen after that? Is that your question?

JUDGE JULIAN: Is that your question?

MR. RILEY: Yes, Your Honor.

MR. BALLIRO: I don't think any answer could possibly be relevant, Your Honor.

JUDGE ALDRICH: Well, I am willing to have it put on the record.

JUDGE FREEDMAN: What doctor positively would ever step out of line and say, "Go ahead and have your abortion" after a judge says, "No", under the statute?

MR. RILEY: May I rephrase the question? The assumption was directed at the child and not at the doctor.

JUDGE ALDRICH: What is that?

[165] MR. RILEY: The assumption was directed at the child and not directed towards any criminal conduct on the part of the doctor.

JUDGE JULIAN: You are confusing me with your question. Stop and think and then ask a question.

Q Doctor, given a situation where a minor child is incapable of giving informed consent for an

abortion and the abortion is not in her best interests --

JUDGE ALDRICH: Counsel, I can not follow you. You said that the child was not capable of giving an informed consent. Then what?

MR. RILEY: Incapable of giving informed consent, and the abortion is not in her best interests, and her parents refuse to consent to the abortion.

Q Would it be good medical practice for the physician nevertheless to perform the abortion in light of the wishes of the child?

JUDGE JULIAN: He can't do that. The law would prohibit it.

MR. RILEY: I am just asking if it would be good medical practice.

A I don't think so. No, it would not be.

MR. BALLIRO: Your Honor, I don't think there can be any good medical practice that runs counter to the law.

[166] JUDGE ALDRICH: Even if there wasn't any law, the Court sees only one answer to that question before the witness has a chance to speak. That is why Judge Julian was bothered by the question originally.

We will take the recess.

MR. COLE: Could we excuse the witness?

MR. BALLIRO: I have no objection.

JUDGE FREEDMAN: Have you completed your examination?

MR. BALLIRO: Yes.

MR. COLE: Yes, Your Honor.

JUDGE FREEDMAN: All right. The witness is excused.

(Recess)

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[167] (AFTERNOON SESSION)

MR. MEYER: Your Honor, the parties have produced a stipulation which commemorates the requested admissions we agree on. There still remains additional matters as to which the plaintiffs and amici wish to argue.

If I may file the stipulation? It lists all the ones everyone agrees have been admitted and also are withdrawn. I have the original and three copies.

JUDGE ALDRICH: I congratulate you for getting this far.

MR. MEYER: So the record is clear, if Your Honor please, the additional matters not included in the stipulation are still covered by the Court's order, it is our understanding, and are merely subject to further argument.

JUDGE ALDRICH: The burden is on the plaintiffs to uncover them.

MR. HENN: Perhaps this might be a good time to clarify a point. It is my understanding that any matter which has been deemed admitted pursuant to the Court's order of yesterday is conclusively admitted as the rule provides and therefore the plaintiffs are not permitted to contradict with evidence nor could the Court find to the contrary.

[168] JUDGE ALDRICH: That is what the rule says. I might be a little troubled whether the Court could find to the contrary, but we will face that problem when it comes up. It would depend on the sort of thing that it was. Obviously you could not stipulate to our jurisdiction if we didn't have any, and there might be some other matters.

MR. COLE: May we call our next witness, Your Honor?

JUDGE ALDRICH: Yes, Mr. Cole.

MR. COLE: The defendants call Ernest Krug.

* * * * * * * *

ERNEST KRUG, Sworn
Direct Examination by Mr. Cole

Q Would you state your name, please?

A Ernest Krug

Q Where do you live?

A In Boston.

JUDGE FREEDMAN: Would you spell your last name?

THE WITNESS: K-r-u-g.

Q Are you an individual licensed to practice medicine in the Commonwealth of Massachusetts?

A Yes, I am.

Q Where do you currently practice medicine?

[169] A I am a senior resident in ambulatory medicine at the Children's Hospital.

Q Dr. Krug, would you review for the Court your educational background beginning with your college education and extending through your post-graduate education?

A I attended college at Harvard and received a bachelor of arts degree. I then went to the Union Theological Seminary in New York City where I received a master of divinity degree. From there I went to the University of North Carolina at Chapel Hill where I received the doctor of medicine degree.

I then went to the Massachusetts General Hospital where I did my first two years of pediatric training and I am now doing my third year of training at the Children's Hospital.

JUDGE FREEDMAN: You went from saving souls to saving lives?

THE WITNESS: I am interested in a lot of areas related to theology, yes.

Q Directing your attention to your experience first at the Union Theological Seminary, what was your course of study there?

A I concentrated in the area of psychiatry and religion, which was a special program at the Union Theological Seminary, and I took courses in that general area. I [170] took courses in the area of, for example, anxiety, dying and death, death psychology and theology. As part of my work at Union I also took training in clinical pastoral education and during my third year at the seminary I was assistant chaplain at the Memorial Sloan-Kittering Cancer Center and I was on the staff of the East Midtown Protestant Chaplaincy and I served as a chaplain in pediatrics.

Q Dr. Krug, were you ordained as a minister in any denomination?

A I was ordained in the United Presbyterian Church, U.S.A.

Q Directing your attention to your work at Union, and particularly the last year you were there, and therefore your work at the Memorial Sloan-Kittering Hospital, would you describe the course of your activities as chaplain at the Memorial Hospital?

A I spent most of my time on one floor, the pediatric floor of the Memorial Sloan-Kittering, and I was involved mainly in counselling activities with the children and parents, and I was involved in leading a Sunday service there each week.

Q Did you have occasion during your work at the Memorial Hospital to counsel parents of adolescents?

A Yes. There were children of all ages there for various [171] types of cancer.

Q In the course of your counselling activities at the Sloan-Kittering, did you find a relationship between adolescents and

parents to be a significant one in your work?

A Yes.

Q How would you in your capacity there as a chaplain view that relationship? How did you work with it? How did you try to help the patients and their parents deal with their problems?

A Frequently in the case of a dying child there was a good deal of isolation between the child and the parents, and that was true not only of adolescents but younger children as well. The child often felt a need to try to protect the parents from the kind of anxiety they were feeling from the situation, and I saw my role, among other things, to try to deal with this isolation of the child from the family and to try to improve communication between the two parties. I was impressed that where there was a significant degree of

isolation there was that much more anxiety on the part of the child and where communication could be improved between the child and the family one could thereby reduce the anxiety, such as in the process of dying.

Q Dr. Krug, turning your attention to your work at Children's Hospital Medical Center, are you involved in any activities [172] at the hospital in conjunction with Dr. Melvin Levine?

A Yes.

Q Would you describe to the Court the nature of that activity, please?

A Dr. Levine is the program director of the program I am in and so he is the overall supervisor of the kind of activities I am invloved in. I do a variety of things this year as do all the ambulatory fellows. I am involved in working in the

neighborhood health center. I work in an educational program. I work in the emergency room.

One of the things that Dr. Levine and I and one other fellow do together is to be involved in conducting ethics rounds which involves presentation of a case and discussion about every other week. This we started for this year about four weeks ago. Ethics rounds has been going on at the Children's Hospital for about eight years.

JUDGE JULIAN: Eight years?

THE WITNESS: About eight years. This is my first involvement with it.

Q I would like to ask you, Dr. Krug, the comments you are making are your own comments, are they not?

A Yes. I did want to make clear to the Court that the opinions I am expressing are my own views and in no way represent the views or opinions of the Children's Hospital.

[173] Q Would you tell the Court in a little more detail about the ethics rounds that you conduct with Dr. Levine at Children's Hospital, and in particular would you give some indication of the nature of the problems that these ethics rounds have considered?

A We try to deal with some of the ethical issues that come up in medical practice, and one of the ways we went about choosing cases for this year's program was to pick out certain kinds of issues we wanted to cover, issues such as truth telling, informed consent, these kinds of very broad and general ethical problems, and then to choose cases which in some way illustrate these problems, and to have the cases presented and then discussed during about an hour's period of time.

One of the ground rules is that no current case is used. The cases are cases which are not currently active at the hospital.

Q Dr. Krug, is there an ethics round scheduled at the Children's Hospital for sometime during the latter part of this month?

A Yes.

Q Would you tell the Court in substance, just summarize the facts which are to be presented?

A The general approach of the ethics rounds in two weeks will be to look at issues of truth telling, and two [174] cases will be presented which present dilemmas in truth telling for the physician, and this will be discussed.

Q Can you tell us if one of those relates to the problem of adolescents and abortions?

A One of them does.

Q Would you describe in some detail the facts as you currently have them for that problem?

A This particular case that is being used is not a real case. It is a manufactured case in which we try to

bring out again the difficulty of truth telling in the case of an adolescent requesting an abortion. In this particular case that has been devised the adolescent comes to her physician wanting to know if she could possibly be pregnant, and the physician determines that she is pregnant, and the physician makes a date for an abortion after discussing it with the patient and making adequate provision for counselling, et cetera.

While the patient is in his office the mother of the patient calls the physician on the telephone. She has been driving down the street and notices that her daughter is going into the doctor's office. The mother has also noticed that the patient has not been feeling well the past few weeks and she wants to know if the physician has reached some kind of diagnosis, so that the parent can

understand the problem and do what [175] is necessary to resolve it, and the physician is then presented with the dilemma in that the patient prior to this call had requested that the parents not know about the pregnancy.

Q Dr. Krug, stepping back for a moment from that individual case, you mentioned before in your testimony the problems of truth telling that physicians face in their relationship with patients.

Could you elaborate on that for the Court? What is this problem of truth telling? Why is it troublesome to physicians in the context of their medical practice?

MR. BALLIRO: I object, Your Honor. I can not see the relevancy.

JUDGE ALDRICH: Let's hear it. You may answer.

A It is certainly important in terms of the physician-patient relationship to have a basic ground

rule of telling the truth to the patient. At the same time I think physicians recognize, and it becomes more or less of a problem depending on the situation, that the truth itself can be used therapeutically or the way in which you tell the truth can be understood as part of the approach to therapy.

There are different ways to tell the truth. [176] One can tell all the truth or some of the truth depending on how one feels it is most appropriate to interact with the patient, what the patient can handle, what is going to produce --

JUDGE ALDRICH: Are you talking about the patient telling the truth to the physician or the physician telling the truth to the patient?

THE WITNESS: The physician telling the truth to the patient.

JUDGE ALDRICH: I misunderstood.

JUDGE FREEDMAN: Well, in the hypothetical case to be presented at the ethics round later this month the ethical dilemma, as I understand it, is not whether the physician should tell the truth to the patient but whether he should tell the truth to the parents of the patient is that correct?

THE WITNESS: Correct.

MR. COLE: Your Honor, I was going to reach that point with another question.

JUDGE FREEDMAN: All right. Would you continue, Doctor?

A So the physicians when presented with a finding in a patient have to make a decision how they are going to relate that finding to the patient, and there are many ways to relate the finding to the patient, how to [177] relate certain findings and whether to relate certain findings. This has come up, I suppose, most in

the public sphere with relation to telling the patient he has cancer.

How do you do it? What do you say? Do you discuss it with the family first? It is not a clear-cut thing.

JUDGE ALDRICH: You do not have that problem with a girl asking if she is pregnant, do you?

THE WITNESS: No.

Q How is the situation in which an adolescent seeks medical care from a physician, how does that situation complicate the truth telling problems which a physician generally faces or may generally face?

A I think it would be fair to say that pediatricians feel a responsibility to inform the parents of findings in their children because parents have a responsibility to their children, and so the pediatrician, particularly in the case of an adolescent where you are dealing with

a person who is not immature in the way that a young child is but is still under the care of parents, and one has to decide how one is going to relate this information. Certainly the dilemma with respect to the patient still applies and the pediatrician in most cases feels an obligation to tell the truth to the patient.

[178] In the case of a child one is dealing with the responsibility to tell the truth to the parent as well as one has to consider how to communicate the findings to the parent so that one is acting in the best interests of the child.

Q In your own practice, Dr. Krug, have you developed a system of analysis or a way of looking at that particular problem of how to decide when to tell or how to tell parents about the medical health care problems of their children? Do you in your own practice have a way of reaching that decision?

MR. BALLIRO: I object.

JUDGE FREEDMAN: You have state twice "in his own practice", and as I understand it he is a resident.

Do you have a practice of your own?

THE WITNESS: No, sir.

Q I mean in the performance of your duties as supervisor of the emergency room at Children's Hospital Medical Center, as a resident who takes care of patients at the hospital, and as an attending physician at the Brookside Family Health Center, have you arrived at a way in which you make that decision when you are faced with the problem?

MR. BALLIRO: I object.

JUDGE ALDRICH: Before we hear the objection of [179] Mr. Balliro, I have not heard whether it is included in his duties to decide whether to inform the parents.

MR. COLE: All right, Your Honor.

Q Dr. Krug, in the performance of your duties is it necessary for you to determine when and how to inform parents about the medical condition of their children?

A Yes.

JUDGE ALDRICH: How often and with respect to what?

THE WITNESS: As I look back, it has not been a problem in the past to me. I personally do not have a whole lot of difficulty or it has not come up in a situation where it has presented a difficulty to me in terms of wanting to withhold information from the parents.

JUDGE ALDRICH: That is the end of the road, isn't it?

MR. COLE: I don't think so, Your Honor. May I inquire further?

JUDGE ALDRICH: Well, with what? I thought we were looking for his personal experience. He has never had any problem.

MR. COLE: I think if we inquire as to the reason why he hasn't, it might be beneficial.

JUDGE ALDRICH: All right.

Q Dr. Krug, would you tell the Court, please, why in your [180] experience you have not had a problem in determining whether to inform parents of the health care problems of their children?

A Well, I suppose part of the answer would be that in the cases where I have been involved it has not been the kind of a situation where it is a difficult one. For example, I have not been involved in dealing with the abortion issue in adolescents, which is certainly a very touchy issue. So that the kinds of things I have had to deal with have not been the types of diagnoses or problems where it has presented a real problem.

JUDGE ALDRICH: Counsel, the Court does not seem to think you have gotten anywhere.

MR. COLE: That answer would suggest the same conclusion to myself, Your Honor. May I try one more question?

JUDGE ALDRICH: Yes.

Q Dr. Krug, in your dealing with these problems in which the issue has not required any other than an obvious answer is there involved in that obviousness a notion of the importance of parental involvement? Is that one reason why the answer has been so obvious?

MR. BALLIRO: I object.

JUDGE ALDRICH: Excluded.

Q In your personal activities and duties at Children's [181] Hospital and other places, Doctor, do you have an opinion of the importance of parental involvement wiuth physicians in decisions affecting the health care delivered to children?

MR. BALLIRO: I object.

JUDGE ALDRICH: He may answer if he has an opinion, and then we will hear why it should be admitted.

A Yes.

Q What is that opinion?

MR. BALLIRO: I object.

JUDGE ALDRICH: Why is he qualified to have an opinion?

MR. COLE: I believe by his training, Your Honor, and particularly the fact that he is involved as a senior resident at the Children's Hospital Medical Center, and is particularly concerned not with the question of medical practice, as the Court understands it, not in the sense of how to do an operation or what is the right answer to a difficult differential diagnosis, but rather how physicians should attempt to structure their interaction with patients and the public.

JUDGE ALDRICH: With all due respect to the witness, he is a very

young doctor. Secondly, he has stated that he has not had any connection with abortions. I think we are a long way off.

[182] MR. COLE: Your Honor, it seems to me that his experience in counselling of adolescents when at Union and his experience and training and thinking about this matter now at Children's Hospital certainly make him a person who can express an opinion on this matter. I would suggest to the Court that senior physicians who are long established in this area are very few. It is not the kind of thing in which Boards are given and people pass tests or examinations. It is a new field and some of the best thinking, I suggest to the Court, is done by young physicians.

If the Court does not wish to hear the witness' views and take them for whatever value the Court judges them to have, then I understand, but I

think that this witness as a representative of the thinking and concern which physicians have about these issues would be a very valuable asset to the Court's understanding cf this problem.

JUDGE FREEDMAN: Hasn't he also stated, aside from the abortion issue, that he has not had any problem in which there was any difficulty in trying to reveal the problems of younsters to their parents?

MR. COLE: He has stated that, Your Honor.

JUDGE FREEDMAN: Where can he help the Court in the problem that we are faced with?

[183] MR. COLE: Well, one of the reasons for this line of questioning is to show that one of the reasons he may not have had any problem --

JUDGE JULIAN: You are trying to lead the witness.

MR. COLE: I think if he were asked if he had an opinion, he would say that he does have an opinion.

JUDGE JULIAN: What is the basis of his opinion?

MR. COLE: May I inquire as to the basis of his opinion?

JUDGE ALDRICH: Yes.

Q Dr. Krug, would you tell the Court the basis of the opinion that you say you have concerning the importance of parental involvement with physicians in making decisions concerning the health care of their children and by basis I mean you own experience and thinking and converastions and judgments you have had with other people.

A I suppose it would be just by virtue of the contacts I have had with sick children as a resident pediatrician having to communicate information about children to their

parents and seeing, you know, the kinds of -- I'm not sure I know how to answer the question.

JUDGE ALDRICH: If you found the child had [184] tonsillitis or a strep throat -- no problem, you would tell the parents?

THE WITNESS: Correct.

JUDGE ALDRICH: What kinds of cases do you have a problem with?

JUDGE FREEDMAN: And what are the ages of the children you have teated?

THE WITNESS: The pediatric age goes from about zero to 18 to 21 depending on the hospital.

Q Would you answer the Court's question concerning the cases in which you might have a problem in telling the parents --

JUDGE JULIAN: Didn't he testify that he never had one?

JUDGE ALDRICH: I have given him another chance to see if he had any.

A I can not think of a situation where that has been a difficulty.

JUDGE ALDRICH: Your previous question is excluded.

MR. COLE: I will try one last thing, Your Honor.

Q In your experience, Dr. Krug, have other physicians in the hospital come to you and asked you for your advice concerning whether they should involve parents in the [185] decision making concerning a child's care?

MR. BALLIRO: I object.

JUDGE JULIAN: We don't even know whether they have yet.

A No, not specifically.

MR. COLE: I have no further questions.

JUDGE ALDRICH: Any cross?

MR. BALLIRO: I have no cross-examination, Your Honor.

JUDGE ALDRICH: Mr. Riley?

MR. RILEY: No questions, Your Honor.

JUDGE ALDRICH: Thank you, Doctor.

JUDGE FREEDMAN: You may step down.

MR. COLE: That is the end of the defendants' testimony.

MR. BALLIRO: I have no rebuttal, Your Honor.

JUDGE ALDRICH: All right, ladies and gentlemen. I suppose the first move chronologically is to dispose of the remaining admissions. Do counsel wish to submit a short memorandum on that?

MR. HENN: We have a memorandum, Your Honor.

MR. BALLIRO: We are prepared to argue this orally.

JUDGE ALDRICH: The Court would be happier to have a memorandum.

[186] MR. BALLIRO: We would be happy to submit a memorandum, Your Honor.

JUDGE ALDRICH: Fine.

MR. BALLIRO: I just wanted the Court to know that we are prepared to argue orally.

JUDGE FREEDMAN: How many demands for admission remain?

MR. BALLIRO: May Miss Schmidt respond, Your Honor?

JUDGE FREEDMAN: Yes.

MISS SCHMIDT: Nineteen on a quick count, Your Honor.

JUDGE ALDRICH: We will take it on memorandum. Mr. Henn has prepared already a memorandum. If Mr. Balliro would like to prepare another one, that is perfectly agreeable, and, of course, Mr. Cole.

MR. COLE: Yes, Your Honor, we would also like to do that.

JUDGE ALDRICH: Since the burden is on the plaintiffs, you may have three days after you receive theirs to make a response.

MR. COLE: Thank you.

MR. HENN: Your Honor, with respect to these admissions --

JUDGE ALDRICH: Service in hand, Mr. Balliro, [187] so three days is meaningful.

MR. BALLIRO: Certainly.

MR. HENN: If your Honor please, with respect to these admissions, I think the 15 that we object to, which we consider of major importance in preventing this Court with making findings that the evidence would otherwise inexorably lead it to --

JUDGE ALDRICH: To interrupt you -- that would be an item we would consider, whether there was prejudice.

MR. HENN: We would think that some oral argument would be appropriate. This could seriously affect the way that the United States Supreme Court would be able to deal with it. I submit that perhaps this court underestimates the extent to which the Attorney General will make

their case out of these admissions rather than anything that has occured in this courtroom. I do not think that it is as major as any testimony of the witnesses.

We are prepared, therefore, to argue it right now.

JUDGE ALDRICH: The Court is not prepared. We do not even have the documents in front of us. If you think that this is sufficiently serious so the memorandum you have prepared should be enlarged, I suggest that you work with Mr. Balliro.

[188] MR. HENN: Thank you. We prepared it overnight.

JUDGE ALDRICH: We appreciate your diligence and you should not suffer from it. Now, the Court was hoping that, in view of our extensive familiarity with the case and the excellent briefs we have had so far, no oral arguments as to the merits would be needed. So counsel seriously disagree with that?

MR. BALLIRO: Your Honor, I have discussed this with my brethren and they are agreeable to submitting a brief rather than orally argue. It would appear, of course, necessary that we know the Court's rulings with respect to these.

JUDGE ALDRICH: Certainly. So we won't set a schedule for that until this is disposed of.

MR. HENN: On the briefs, Your Honor, all the parties in this courtroom except for the Attorney General's office, supposed that when this Court asked for briefs it meant briefs at the time of trial, briefs on the law. The Attorney General's office chose to interpret that to mean a memorandum on the evidence, so that they are like the appellee where they have an opportunity to respond to everyone else, after having read their briefs on the law, and we do not have theirs. Obviously we have no interest

in arguing orally. We don't know what their arguments on the law will be. We are put in a similar [189] position to that of an appellant on appeal.

I would think it appropriate to have an opportunity to file a reply brief within an appropriate time.

JUDGE ALDRICH: Well, don't cry before you are hurt. I don't know whether they are going to bring up anything new. We will expressly leave open your opportunity to file a further brief.

MR. COLE: Your Honor, may I be heard on whether the Attorney General has inappropriately --

JUDGE ALDRICH: I did not say for a minute that you had done anything inappropriate.

JUDGE FREEDMAN: Just as a matter of curiosity, assuming the Court is in a position to act on these requests for admissions within a reasonable

period of time, how much time thereafter do the parties feel they need to file briefs?

MR. BALLIRO: To some limited extent, Your Honor, my feelings would be dictated by how long it would take us to get a copy of the record. I would say that after receiving a copy of the record. I would say that after receiving a copy of the record three weeks.

JUDGE FREEDMAN: And by record do you mean a transcript of the two days proceedings?

MR. BALLIRO: Yes.

JUDGE ALDRICH: Mr. Duffey will do his best [190] to have it by Monday of next week.

MR. BALLIRO: Three weeks after that, Your Honor.

JUDGE ALDRICH: The time does not start to run until you get our answer.

JUDGE FREEDMAN: Is that agreeable with the defendants and intervenors?

MR. COLE: Agreeable.

MR. RILEY: Agreeable.

JUDGE ALDRICH: How long do you think it will take you to do this, Mr. Balliro?

MR. BALLIRO: We have done it substantively.

JUDGE ALDRICH: You have done so in such a broad brush that you did not persuade the Court.

MR. BALLIRO: I meant we did it last night, not prior to that. I think we can do it in seven days, Your Honor.

MR. COLE: There is one final matter, Your Honor, and that is the status of the material in the record of the previous hearings in this case, and that is one of the items that is listed in our pretrial memo.

JUDGE ALDRICH: You wanted them to specify what they were looking to?

MR. COLE: Yes. It seems to me that a lot of [191] the previous testimony in this case was admitted

under a different theory of law and therefore under a different standard for materiality and relevancy. I am suggesting that it would be time-consuming to go back and try to sort all that out or ask the Court to be involved in that.

I think if we could have a mechanism when it appears that the material is used by one party or another, we could have perhaps a reply brief or something so that materiality and relevancy could be argued in the reply brief.

JUDGE ALDRICH: Judge Julian and I have been talking off the cuff. Are you contending that this statute is unconstitutional insofar as it applies to minors who are incapable of consenting?

MR. BALLIRO: Yes.

JUDGE ALDRICH: You are?

MR. BALLIRO: Yes, as well.

JUDGE JULIAN: You did not so allege in the complaint. The complaint does not make any allegation with respect to anybody who is not a mature minor capable of understanding.

MR. BALLIRO: I would respond by saying that we did not exclude that.

JUDGE JULIAN: You did not include it. You are the plaintiff who makes the allegation.

[192] JUDGE ALDRICH: Would you give us a rough idea what argument you would make with respect to a minor who everybody would agree was not mature enough to consent?

MR. BALLIRO: I am not sure I would, Your Honor, upon considered reflection after listening to all the evidence. I merely do not want to waive that at this point, that's all.

JUDGE ALDRICH: That is a fair enough proposition, but I think that you and your brethren ought to have an

understanding with respect to that so that we will know what ball field we are playing on.

MR. BALLIRO: Yes, Your Honor.

JUDGE JULIAN: Do we have any evidence before us with respect to 11 year olds, 12 year olds, 13 year olds or 14 year olds? As a metter of fact, the lowest age I heard mentioned throughout the entire case has been 15.

MR. BALLIRO: I think in the requested admissions you may find that kind of evidence, Your Honor, that fairly could be relied upon for the purpose of argument. It is in the data.

JUDGE FREEDMAN: How about the statistics in 11 MILLION TEENAGERS?

MR. BALLIRO: You might find something in there as well, Your Honor.

[193] JUDGE ALDRICH: That might be the first question for you and Mr. Henn to have some understanding about.

MR. BALLIRO: I will do everything I can to relieve the Court of having to --

JUDGE ALDRICH: It is not a question of putting the burden on us. We are concerned with having two railroad trains that do not run on the same track -- I am getting my metaphors mixed -- maybe if they were both running on the same track, there would be a collision.

JUDGE JULIAN: Unless they were running in opposite directions.

JUDGE ALDRICH: Surely your brethren are entitled to know the extent of your allegation, and they are horrified that you might be contending that an immature minor is hurt by the statute.

MR. BALLIRO: I am perhaps not as horrified as they are.

JUDGE JULIAN: There were no questions certified to the Supreme Judicial Court with respect to immature minors.

MR. BALLIRO: I understand that. I will take that into consideration very strongly. I would say my tendency is not to include that. I merely did not want to waive it.

[194] JUDGE ALDRICH: We are not asking you to waive it.

MR. BALLIRO: I understand.

JUDGE ALDRICH: You should communicate with your brothers. I am sure they will complain that you contend otherwise.

MR. BALLIRO: I hear you, Your Honor. May I just say one thing more not in response to but by way of comment to the defendants' statement to the effect that we are proceeding under a different theory of law. We are not. They may decide to because of the previous position they have previously taken, but except for the addition of Section 12(f), our position is pretty much the same. I mention that only because I would like

to feel free to rely upon whatever testimony or evidence is in the record previously.

JUDGE FREEDMAN: You have that right.

JUDGE ALDRICH: Mr. Cole is worried that it might not be relevant. If you can show you are hurt, we will listen to you.

MR. COLE: Your Honor, I have two things to say. First, I am a little concerned at Your Honor's use of the words "as applied". I can not remember exactly what you said -- as applied to a group of immature minors or something like that.

[195] It is the defendants' position that this case is a facial attack on the statute as interpreted by the SJC.

JUDGE ALDRICH: By using the words "as applied" I did not mean that as a term of art. We have a quagmire here as to what is a facial attack.

MR. COLE: Quite so, Your Honor.

JUDGE JULIAN: I am not sure that the parties have told us what is being attacked. Is it the entire scope of the statute, including all female children who are capable of conception or are we being called upon to determine the constitutionality of this statute with respect to mature minors only? We have never been told.

MR. COLE: Our view, Your Honor --

JUDGE ALDRICH: That is what Mr. Balliro is going to tell us.

JUDGE JULIAN: I would like to know.

MR. COLE: Well, we have done the best we can, not being the plaintiffs --

JUDGE JULIAN: I am asking what the derendants consider to be the scope --

MR. COLE: We consider a facial attack on this state statute --

JUDGE JULIAN: With respect to whom?

MR. COLE: To every woman that the statute [196] applies to on its face.

JUDGE JULIAN: And that includes the minors who are not capable of conception?

MR. COLE: Absolutely, and we believe that under Broderick v. Oklahoma that that is a terribly important consideration.

JUDGE JULIAN: Do you contend that the statute is not severable so as to apply to mature minors and not to immature minors?

MR. COLE: Your Honor, in our original memorandum on the motion for stay in this court we briefed that issue and we pointed out that the ststute has a rather extensive and direct severability clause.

JUDGE JULIAN: I have asked you a specific question on that issue. Do the defendants that you represent take

the view or don't they take the view that the statute is severable as between mature minors and immature minors?

MR. COLE: The answer to Your Honor's question is that we take the view that it can be severed as to those two questions. If I could answer further and explain why I answer in that way? It is not that easy.

The procedural posture of this case is a facial attack which places the plaintiffs, it seems to us, in a situation having to show under cases like [197] Broderick v. Oklahoma that there is substantial overbreadth in this case. We say that that attack can not succeed because it is unarguably valid as to first and third trimester abortions about which no possible argument can be made. It is, we believe, beyond cavil that it is

valid as to the immature minors. So there is at best the residual about whom the plaintiffs might complain.

As Judge Aldrich has pointed out, this raises the question of facial versus as applied.

When I answered your question, what I meant by it is that I do believe it but I think procedurally what would have to be done is that a facial attack would have to be rejected and that an as applied attack, that is to say as applied to a group of minors so defined by the Court, shall we say, mature minors, that the statute would be invalid on constitutional grounds as applied to that class. That in our view is a second question not before this Court now.

JUDGE JULIAN: That is what the plaintiffs have alleged from the very beginning.

MR. COLE: We feel, Your Honor, with all due respect, that it is an as applied attack.

JUDGE JULIAN: What of it?

JUDGE ALDRICH: As applied is a term or word of art and has more meaning than that. As applied would [198] be whether the Superior Court behaved itself in a benign fashion. As directed -- to get away from that word -- as directed to a certain class.

MR. COLE: If the Court takes that view, then we say that the applicable law follows from Broderick v. Oklahoma and the question becomes one of substantial breadth.

JUDGE JULIAN: I don't follow you.

MR. COLE: What I mean by that, Your Honor, is, as I understand cases like Broderick v. Oklahoma --

JUDGE JULIAN: Just don't refer to a case by name. I don't happen to remember the precise contours of that case.

MR. COLE: I am sorry and I will try to explain. What I understand that case to stand for is that in facial attack cases what a court must do is look to see whether the unconstitutional effect of the statute is so substantial that its constitutional effect as it is applied to other fact situations, as it affects other fact situations, as it encompasses other fact situations, whether that so outweighs the valid constitutional results of the statute as to make it unconstitutional.

JUDGE JULIAN: What you are saying is if the Court finds it is not a severable statute --

[199] MR. COLE: When I use the word severable, I generally relate it to the fact whether there is a clause or a sentence or something like that in the statute that can be knocked out and the rest of the statute remain intact. That, I don't think, is

possible to the problem you suggest and that is why I went to the analysis that I did, Your Honor.

JUDGE JULIAN: I am somewhat at a loss as to why so much was made in most of the pleadings confining the case to mature minors.

JUDGE FREEDMAN: That bothers me a little bit. I would like to know what you believe the class is, Mr. Cole, that has been certified to this Court because you mentioned a couple of things in one of your briefs which have been somewhat troublesome to me.

MR. RILEY: Your Honor, may I make a statement?

JUDGE JULIAN: Yes.

MR. RILEY: I believe when the initial stipulation was made concerning the facial attack, that was as a result of notification to the defendants and the intervenors at that time that they were going to call Mary Moe I and III. We made a request for

the disclosure of the identity of Mary Moe I and III and the affidavit of Mary Moe III indicates that she was living away from home, was a minor and had a previous child. We said at [200] that time, "Is this an attack as applied to these individual minors or is this just a facial attack?" Because, we said, if it was an "as applied" attack on minors, we thought it was necessary to identify those individual minors so their testimony could be brought in.

JUDGE FREEDMAN: Let me see if I can help all of you. On page 6 of the original Opinion, I would ask you to read the next to the last paragraph which says, "We find that Mary Moe, Parents Aid Society, Inc. and Gerald Zupnick have standing, as representative party plaintiffs, and Jane Hunerwadel as intervenor. From the standpoint of their being due and adequate class representatives, we

find they have a strong personal interest and are competently and vigorously represented by legal counsel, and we certify this as a valid class action as to all.

"Before leaving the question of standing we note that Parents Aid Society and Dr. Zupnick by hypothesis cannot lawfully, with exceptions too unusual to be concerned with, perform abortions upon minors incapable of consenting. Nonetheless, we hold that they do have standing to attack the statute as applied to all minors, at least insofar as it requires the consent of both parents."

I think that makes the issue very clear.

MR. BALLIRO: I think I should point out to the [201] Court that on Page 5 of our complaint we refer to the standard lists overriding the patient's informed consent.

JUDGE ALDRICH: If they are incapable of consenting, that is not informed consent.

MR. BALLIRO: That is correct, Your Honor.

JUDGE ALDRICH: That doesn't add anything to what Judge Freedman has said.

MR. BALLIRO: No, Your Honor, but that is the way our complaint read.

JUDGE ALDRICH: Is there any other matter?

MR. BALLIRO: No, Your Honor.

JUDGE FREEDMAN: Is everyone clear on the timetable?

JUDGE ALDRICH: We are hearing from Mr. Balliro within a week on the matter of where he claims to be prejudiced as to our ruling admitting all the matters demanded of Dr. Zupnick. Three days after that we are hearing from Mr. Cole as to why he thinks Mr. Balliro is excessive in his request. After we have ruled on that

matter, Mr. Balliro has three weeks to write a brief, assuming by that time he has heard from Mr. Duffey.

Now, Mr. Henn doesn't want Mr. Balliro to have the same three weeks or do you want to have him just have the three weeks?

MR. HENN: The Court is contemplating [202] simultaneous filing of post-trial briefs, I presume, and in light of the evidence which was as we expected our brief is what we thought the Court requested which was a brief on the law and we have presented it.

Mr. Cole has put himself in the position of an appellee on appeal.

JUDGE ALDRICH: You filed a very wide-covering brief. At the same time, I don't think you alerted him, with his intelligence, to anything that he did not expect.

MR. HENN: You are probably right.

JUDGE ALDRICH: So that does not bother me. It will be the same three weeks. Anybody who wants to file a reply brief after that time may so move.

(Evidence closed.)

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[Title omitted in printing.]

Deposition of Carol C. Nadelson

Deposition of CAROL C. NADELSON, taken pursuant to Notice before Barbara Sakurai, Notary Public, at the offices of the Attorney General, One Ashburton Place, Boston, Massachusetts, on Wednesday, August 3, 1977, commencing at 10:00 a.m.

* * * * * * * *

[3] MR. MEYER: For the record, my name is Michael B. Meyer. I represent the defendants in this matter and I believe that all parties are willing to stipulate that all objections except objections as to the form of the question are reserved until trial. I would further state that we are not going to waive the signing and the filing of this deposition, as it

is our hope that we will be able to use this, at least in part, in place of direct and cross examination at trial, if that is possible.

Is everyone willing to agree to those stipulations?

MS. GRACE: All right. Yes.

MS. SCHMIDT: Yes, that is agreeable.

MR. RILEY: Yes.

CAROL C. NADELSON, a witness called by and on behalf of the defendants, having first been duly sworn, deposes and says on her oath as follows:

DIRECT EXAMINATION BY MR. MEYER

[6] Q Is recidivism a problem with unwanted teenage pregnancies?

A Yes.

Q Why is it a problem?

A That is a very complex issue. It is a problem for a [7] number of reasons, partly having to do with the nature of the adolescence and what that development is like and what kinds of issues have to be dealt with. It is partly a problem because of some of the difficulties in obtaining birth control and good counseling, and it is partly a problem because, often, of family and other psychological issues.

Q What would you say were the causes of recidivism in unwanted teenage pregnancies, if you were asked to list the causes of that problem?

A Well, I think one of the important issues is to think about the adolescent period, which is a developmental phase where kids are sort of struggling to separate from families and to become individuals and develop their own identities. In the process of that they often act in a

way which may not be very future oriented and they sometimes don't think of the consequences of acts and often, and certainly during adolescence, a conceptualization of one's self as an adult is extremely difficult, if possible at all, and, again, it varies with adolescents, and with the age that you are talking about -- you are talking about a different person at 14 than at 18, all of whom are adolescents. So that is certainly one problem.

[8] Another problem has to do with family difficulties and instabilities which affect teenagers very markedly. Just for an example, a teenager who is doing pretty well at age 14 and whose parents get divorced, may very well wind up handling this stress by becoming pregnant. Some teenagers do it again for that reason, but any kind of family difficulty could be reflected in that, so can school and

other kinds of difficulties. Peer pressure is an important issue, depending on the peer group of that youngster, and what kinds of pressures they are subjected to in school and in other places.

Then I think the issue of really integrating what they know -- just in terms of the work that has been done we find that some teenagers certainly are not knowledgeable about things like contraception at all; others do have the facts but can't really use them because they don't see them as related to them.

So that one needs a little bit more in programs for counseling adolescents then is generally available for them, and, certainly, our sex education programs are generally totally inadequate with regard to that. Then I think there are a great many mythologies and fantasies and ideas about what one is

doing that are related to why they behave in the way they do.

[9] Q Excuse me for interrupting you. When you say mythologies and fantasies, you mean mythologies and fantasies held by the teenager?

A Yes.

Q Please continue.

A Do you want me to say more about that?

Q Please.

A All right.

Well, certainly the most important one is: It can't happen to me. The next most common one is: It doesn't happen the first time -- and on and on and on; but, you know, that is pretty characteristic of the kind of thing that you see and it really takes most teenagers until they get toward the end of that period -- maybe 18 or 19 -- before they really have a concept of themselves in the world and an

ability to make a plan that takes into account what the ramifications of an action like pregnancy may be.

Q If I could just list a few possible motivations for teenagers becoming pregnant that we have obtained from the literature, I would ask if you could just state if you think that that is a possible motivation or one that has occured sometime or another.

A All right.

[10] Q Self-punishment, is that a possible one?

A Yes, sure.

Q Replacing some loss?

A Yes.

Q Depression?

A Yes.

Q Deprivation in an earlier stage of childhood?

A Yes.

Q Hostility to parents?

A Yes.

Q Uncertainty of the teenager's own femininity?

A Right.

Q Desire to be like their mother?

A Yes.

Q The ones that I just listed and asked you to agree with, are those possible motivations, the type of motivations that require counseling?

A Yes.

Q In general, what are some of the results of repeated unwanted teenage pregnancies?

A You mean psychological, sociological or whatever?

Q Psychological, if that would be the easiest.

A Well, just to start with something that is easier, I think, you probably are aware of the physical hazards.

[11] Q Would you list them quickly?

A Certainly. There is a higher rate of prematurity and perinatal mortality for the infant, and complications of pregnancy and labor for the mother. So that there is a higher rate in adolescence, which is generally believed to be related to poor prenatal care.

Q Let me interrupt you a second. You are now comparing pregnant minors to pregnant adults?

A Yes.

Q And you are saying that pregnant minors have greater risks of the kind of things you just mentioned?

A Right.

Q It is also true that those risks increase with the number of abortions that the minor has had?

A Those risks? They are not related to abortion; they are related to pregnancy.

Q All right.

You were listing the increased risks that a pregnant minor runs, as contrasted to the risks of any pregnant adult.

A Yes.

Q All right.

As a minor has additional abortions, what physical results can occur?

[12] A Well, as far as I am aware, it is not any different than in an adult, and the evidence is very poor that anything happens, except there is a question that there may be problems with subsequent pregnancies after more than four or five, but that is rarely tenuous data.

Q With subsequent abortions?

A With subsequent pregnancies. In other words, there may be some effects physiologically but that is not only tenuous data but it is not clear what it is based on or, you know, how you can obtain that kind of

data. In other words, you don't know what would have happened to that person in another situation. They may be vulnerable anyway. So I am hesitant to say that we have any good evidence of anything.

Q Is there any evidence that repeated abortions cause a higher incidence of cancer of the cervix?

A I couldn't answer that question. I am not a gynecologist.

Q How could recidivism in unwanted teenage pregnancies be reduced?

A Well, there are a lot of things I think one could do in the best of all possible worlds, but I think that the number one issue, very clearly, in dealing with the entire problem is dealing with education aspects in the first place. I think the most vulnerable people are the [13] ones who most often have the least available to them, in terms of

education. I think counseling resources are terribly critical, and that is also poorly lacking.

A teenager who has a problem really doesn't have any idea of where to go or who to talk to so that we really aren't providing for those kinds of needs. We do know that teenagers often have a hard time talking to their parents about sexual issues, either because their parents are unreceptive or they are embarrassed or frightened or uncomfortable. Sometimes they find it easier to talk to other people, but if they don't have those other people around they find their peer groups to talk to. So those would certainly be major steps.

The other thing I think is critical is really making the information and contraception readily and easily available, without the usual hassels that people have to go through now.

Q With respect to counseling, you stated that in some cases the minor might need counseling. I take it some of the causes or possible motivations for adolescent pregnancy or some of the problems that might be solved by counseling are problems the minors might not even be aware of themselves.

A Yes, that is true.

[14] Q If we could go back just a minute to the impacts of recidivism.

A Yes.

Q You listed some of the physiological and physical impacts. Could you list some of the psychological effects of repeated unwanted teenage pregnancies?

A I think the major thing we see clinically all the time is that once somebody who is a minor has a child the chances of them getting back to school and finishing their education or ever getting a job are

really minimal. The chances are that they are going to repeat and be on welfare, not finish school and, you know, that is one end of the sociologic perspective, the cycle of poverty, that one keeps seeing.

I think from the psychiatric point of view a great many of these teenagers really feel they are inadequate to be mothers. They really can't cope. They get very depressed about it. They often feel helpless about it, about what to do with their lives. They often come into it from a psition of not seeing themselves as master of their lives. I mean it is a common problem for women generally, but it certainly is for this group; and, having that happen in a way which was unplanned for and which changes the course of their life in such a [15] significant way, really makes them feel impotent again, and the picture that you see certainly goes along with that.

I think the other very serious issue has to do with child abuse and the real inadequate potential of these girls for really dealing with what it is like to rear children and what some of the difficulties are, because they are children themselves, basically.

Q You are referring to the potential that the teenage mother may be a child abuser?

A Yes.

Q Now, you just said something to the effect that the teenage mother or the prospective teenage mother is, in a way, a child herself. Would you explain why that is true?

A Well, I think she hasn't reached a level of maturation where she can assume adult responsibilities and carry them through, necessarily. I mean that is one factor among the many, but people do things impulsively at that point that they don't do later on, and one expects them to do that

because they are not in a position where they can make future-oriented judgments or assume these responsibilities.

Q Would you agree as a general proposition that counseling [16] can reduce recidivism in unwanted teenage pregnancies?

A Well, we like to think it can and we hope it can. There is some evidence that it can, but there is some very good evidence -- you are probably familiar with the Sarrel study that is in the American Journal of Public Health -- it was quite a while ago, at least 10 years ago, I think -- where they developed a program which included counseling in groups and some educational experience, and, clearly, in that group, it reduced recidivism.

There are some other studies that seem to go in the same direction, although usually not as dramatically.

Q Would you say that, in general, family counseling might decrease recidivism of unwanted teenage pregnancies?

A Might, if you could get the family.

Q With respect to counseling in general, how would it be done?

A Well, it would depend on the institution that you are talking about and the resources of a particular community, so that it would vary enormously from one community to another. It also has a lot of implications in terms of cultural determinants. For example, if somebody lives in an inner city, one might have very few resources because people are so overtaxed. If you live in a suburb, [17] it might be very easy to have one-to-one counseling. So that there are lots of different models that one has to devise for the community one is operating in.

Q Would you agree that as a general proposition counseling for teenagers who have had or are having an unwanted pregnancy should be nondirective, as opposed to directive?

A How do you define those?

Q When I use the word "directive" I mean counseling which is aimed at producing some result or some opinion in the person being counseled, a result or opinion that is previously held by the person who is doing the counseling.

A Any good counselor should not impose an opinion.

Q If you, as a doctor and a psychiatrist, are dealing with a teenager who has an unwanted pregnancy, how would you go about encouraging counseling and insuring that the counseling, in fact, gets done?

A Well, again, it depends on the situation. If somebody is seeing

me as a private practitioner, I have different resources than if somebody is coming through, say, the Beth Israel or Children's Hospital Clinic. I think that is an important factor.

Frankly, generally speaking, it is almost easier to deal with people who come via the private sector [18] because they are often more motivated and their families usually are more motivated to do something, and that varies a great deal when you are dealing with clinic populations when somebody comes in with a pregnancy which they define as unwanted. It is critical to try to recommend that they have counseling -- and we have in our clinic, and I think most social workers who are available and there in that clinic who will see youngsters and try to help them and work out what they want to do.

Q You would recommend or refer the teenagers directly to that social worker within the Beth Israel?

A The system is a complex one, and if I am in a position, I would, but there are various avenues that would be a general approach.

Q If this patient can't come to you through your private practice, how would you encourage counseling or how would you insure that counseling was done?

A It would vary. Sometimes I would do it; sometimes I would refer them to somebody who I think is a competent counselor, you know, having prepared them for what the situation was.

Q Now whether you were doing the counseling yourself or whether you referred the patient out, I take it you [19] would encourage counseling as a general rule, is that correct?

A Yes.

Q Would you tell me what the term "family pathology" means in psychiatry?

A One could write a book on that one. To be brief, it usually means families where there is some either pathological interaction, i.e., disturbance in interpersonal relationships, or where one member of the family or another is seriously disturbed, and, thus, might affect other people in the family.

Q Could a so-called "family pathology" be one because of unwanted teenage pregnancy?

A Oh, yes.

Q Now, doctor, are you familiar with the term "informed consent"?

A Yes.

Q Could you tell me what you mean when you use that term and what you understand it to mean when it is used by your fellow pediatricians and psychiatrists?

MS. GRACE: Would you mind asking those questions one at a time, please?

MR. MEYER: Certainly.

Q Would you tell me what you mean when you use the term [20] "informed consent"?

A All right.

What I generally mean is that the patient not only knows the nature of the situation, i.e., the illness or whatever they have and has some understanding of what it is, but also knows the implications of what that is and knows what the implications are of the alternative kinds of choices that the individual has to make, and when finally the individual makes the decision about they want to do -- whether it is an abortion or another surgical procedure or a medical one or anything -- they have a sense of what it is they are agreeing to and doing and what those implications are.

Q So is it a fair result of what you have said that for someone to give informed consent to a procedure they have to understand both the risks

and the nature of that procedure and also the risk and the nature of other alternative procedures or the risks and the nature of doing nothing; is that a fair summarization?

A Yes, that is fair.

Q Is the description you have just given me of the term "informed consent" that you mean when you use that term, is that a similar meaning that you believe that is used [21] by other psychiatrists and pediatricians?

A Yes, I would say generally that's sort of the more ideal model and, you know, sometimes we have all kinds of glorious ideas about what people understand and we find out that they don't. We do the best we can.

I don't know if you are familiar with it, but there was a report, I guess about last summer or the summer before, in the New England Journal of Medicine, where they studied a group of patients who were informed about

surgical procedures and they tape-recorded the process of the informing, and they discovered a very high percentage afterwards did not remember anything that they had said on the tape.

Q A high percentage of the people being informed?

A Yes, you know, they said a day later: I never heard -- I don't know what you are talking about, or I don't really understand this; and so that is certainly a common clinical experience. You do the best you can.

A Would you agree that, as a general proposition, as an adolescent progresses and grows older they are more able to give informed consent?

A Generally, yes, I would say that is true.

Q Would you agree, as a general proposition, that for any age minor there are some minors that cannot give informed [22] consent to any medical or surgical procedure?

A That is true of some adults also.

Q It is true of some minors, no matter what the age?

A Sure.

Q Would you agree that, as a general proposition, some minors give informed consent to a relatively simple procedure, but a more complicated one might entail a weighing of risks and alternatives which would make it impossible for them to give informed consent to that other more complicated procedure?

A Yes. Again, the same is true for some adults.

Q Now, based upon your experience dealing with adolescents and based upon your opinion of how serious a first trimester abortion is, would you give me a statement of what percentage of 17-year-olds can give informed consent?

MS. SCHMIDT: I think this was all gone into in the course of the first trial and the Court made a specific finding on the capacity of minors to give an informed consent. I think if you refer back to the trial transcript in the Court's opinion these issues have been, I think, fairly well defined.

MR. MEYER: I think this is going to lead to eventually relevant material and so I am going to press [23] the question. I understand your concern about time and I will move through this very quickly.

Q Could you give me an estimate, your estimate, of the percent of 17-year-olds who could give informed consent to a first trimester abortion?

A I couldn't give you a percent because I would have to know more about what group of adolescents you were referring to.

Q The group in your practice.

A Private or clinic?

Q Private first.

A In private practice most of them would, I would say most of them, 95 percent, at least, could give informed consent. It is somewhat lower in the clinic practice, but not terribly much.

Q If a 10-year-old came to you through your private practice, how likely do you think that 10-year-old would be to be able to give informed consent to a first trimester abortion?

A They usually don't get pregnant.

Yes, but when they did, how likely do you think it would be a 10-year-old would be able to give informed consent to the first trimester abortion?

A Again, 10-year-olds don't get pregnant.

[24] Q Have you ever dealt with a 10-year-old pregnancy?

A Again, we have had a couple -- one or two.

Q And, in your opinion, were they able to give informed consent to an abortion?

A Yes --- Well, informed consent is a different issue for a 10-year-old because you have to deal with it in terms of what a 10-year-old's capacity to understand is, and so it has to be handled in a totally different way. I mean it is not the same issue.

Q Is it your opinion that 10-year-olds could give informed consent to a medical or surgical procedure based upon a different type of understanding than an older adolescent or adult might give it?

A Sure. They would understand it differently, just like they understand tonsilectomy differently than a 14-year-old might.

Q In what way would a 10-year-old have a different understanding of the risks and the alternatives when a 10-year-old was giving informed consent to an abortion?

A Well, a 10-year-old generally doesn't have a terribly great concept of anatomy or physiology or what the nature of a procedure would be. They would see it in terms of do they get cut or get a shot or not, and that would be the way it would be dealt with at the medical [25] level. So that the procedure itself would have to be explained in terms of what happens more concretely. You would not go into a complicated detailed description because it would be confusing and meaningless and upsetting, probably, for a ten-year-old.

Again, people who know how to talk to children have to be involved with this kind of thing. Ten-year-olds are

somewhat different than the 11 or 12-year-olds we sometimes see.

As to the issue of having a baby, a 10-year-old wouldn't have the foggiest idea of what a pregnancy was, really, unless they had a mother or a sister or somebody who was pregnant around them, and that is often the experience, but not always the experience of 10-year-olds. They may, in fact, know what it is --- Well, they generally do, but they would have to know more about what it is like to have a baby, what the process would be like, which would be very hard to explain to a 10-year-old since they have no basis in past experience. One might have to do it in a complicated way like with dolls or something, to make it clear.

Also, in terms of the issue of having a baby, one would have to differentiate what having a living baby to be responsible for would be

like, which, you [26] know, again is not possible for a 10-year-old to understand.

Q Would a 10-year-old have to understand the problems of having a child as one of the alternatives when they were pregnant in order to give informed consent to an abortion?

A I think anybody has to understand that, if they give consent.

Q And I take it your testimony is that it is difficult for a 10-year-old to understand what a pregnancy is and what carrying into term means?

A Yes.

Q Now, just to go back a minute, you said that maybe 95 percent of the people that came to you in private practice that were 17-year-olds would be able to give informed consent. Could you give me a rough equivalent number for 16-year-olds?

MS. SCHMIDT: Object to this whole line of questioning for the reasons I gave before.

Q Could you answer the question, please?

A Probably close to the same percent.

Q Somewhat lower?

A Maybe. It is a guess. There is no data behind it that I am aware of.

[27] Q And could you give me some more numbers for other ages -- 15 and 14?

A Well, I think you would probably go down progressively but slowly. I think that --- I know you are trying to define a level, which is really not possible, because development is a process and you can define a sort of general population, but there are some 25-year-olds that can't do much better than a 10-year-old. So, you know, when you

try to generalize it, it muddies the issue, I think.

I think the cutoff that one might think about in those terms has to do with what the cognitive capacity of the youngster is, and that you'd have to determine by testing them and interviewing them as to what their capacity for understanding was.

My own experience is that most 12-13 and on youngsters really have a pretty good idea of what is happening, and one could say, roughly, that probably puberty has some effect on their understanding of their bodies, but some 10 and 11-year-olds also have a better idea than one might expect.

Q What kind of testing and interviewing would be necessary to ascertain whether this was, in fact, the case?

A Well, I think, again, this depends on the person who is [28] doing it and what their concerns are.

One could certainly test -- and I am not a psychologist so I can't give you the specific tests that I would use in it -- but one can test developmental levels. There are a whole variety of ways that one does that. Tests have been devised for concluding intelligence, intelligence testing, and there are a whole variety of things that are age scaled, but what we are talking about is an issue of cognitive development, which is a very complex area and there are certainly -- Piaget and Kohlberg among others have written about that, that kind of level of testing.

In terms of interviewing, a skilled pediatrician or child psychiatrist could easily do that by sometimes using derivative material and gradually moving to the specific issues.

Q Are you familiar with the Kohlberg theory on the stages of model development?

A Yes.

Q How long would it take someone who was adherent to that type of theory to test a child to determine these things?

A I couldn't answer that.

Q How long would it take a psychologist using standard tests of the type you have described to make this evaluation?

[29] A I couldn't tell you. I am not a psychologist.

Q Would you give the same answers for Piagetian psychologists?

A Yes.

Q Does an abortion have different psychological impacts on a minor than on other surgical procedures, such as a tonsilectomy?

A Well, again, we have to define the level of age of the minor and the way the procedure is explained. A tonsilectomy could certainly be quite the same

experience. It may be even more traumatic to a child who didn't understand what was going to happen or didn't know beforehand what to expect, so that one could use the same level or the same kind of preparation and -- well -- there certainly is no evidence that there is any major traumatic effect. I am not aware of any good studies that compare those two. All I can say is, from clinical experience, that it would depend entirely on how it was explained.

Q Would you think that a minor's decision to have an abortion, a first trimester abortion, was a more difficult and more important decision for that minor than the decision to have, say, a tonsilectomy?

A I think it depends a lot of the age of the minor. Certainly this has been our experience, and I am going [30] through rough kinds of age guidelines, but roughly, around 16

would be the time when you expect most teenagers to be really quite clear on all of the implications of an abortion in the same way that adults tend to think about it. A 13-year-old would have a concept of what she was doing, but the whole issue of babies is a totally different thing for most 13-year-olds, or the idea of having a pregnancy, and, actually, having a baby is just a crazy idea to a 13-year-old. It doesn't have any relevance. An abortion is a procedure to a 13-year-old and most of them don't think terribly much about it and don't seem to have much more happen to them.

Q Let's deal with the class you described.

A All right.

Q First of all, doctor, let's take the 16-year-olds and over.

A Yes.

Q Would you agree, that, for the class, the psychological impact of having a first trimester abortion is greater than the psychological impact of having a tonsilectomy?

A I can't really answer that with any data because they are really not comparable issues.

Q Can you answer that based upon your professional experience and expertise and learning?

[31] A You are dealing with apples and oranges. They are not the same kind of thing. A tonsilectomy is a procedure that is done because you have something wrong. You have infected tonsils. You have been sick. An abortion is something where you are not sick. You have no feelings about being sick. You have, in the end, some vague idea about what might happen if you don't do it, which is a pregnancy. They are not the same.

Also, when you talk about the effects, do you mean the effects the day after, the week after, six months after, two years later? They vary considerably. All we can say is that the evidence is that abortion does not have a psychologically effect. I think in some people a tonsilectomy could and in other people an abortion could.

Q Would uou agree with the following statement that "A minor having an abortion involves the first time in life the adolescent faces a decision with permanent lifelong effect where she has to determine a life goal, which may be immutable." Would you agree with that statement?

A That is roughly what I said.

Q And you agree that statement is correct?

A It is out of context.

Q Is it correct that a minor's decision to have an abortion [32] may

be the first time in that minor's life where they have to determine the life goal, which may be immutable?

A Yes.

Q And is it correct that the decision whether or not to have an abortion may have a permanent lifelong effect?

A Yes. It is actually really more than decision to have a pregnancy that we are dealing with.

Q Would you explain that a little bit?

A When somebody is faced with an unwanted pregnancy, to continue that pregnancy will change their life in one way or another, because they will go through the whole process, and the aftermath. To have an abortion will not change their life substantively. It will change their inner psychological sense of themselves, because they have made a decision that they have never had to

make before. I think that is the important difference.

Q Now, that psychological effect about having made a decision that they have never had to make before, would that apply to a tonsilectomy, as well?

A Most people don't make decisions about tonsilectomies. In other words, it is not the same thing.

Q What you are saying is that a tonsilectomy is, basically, a non-controversial procedure which the doctor recommends and people generally go along with?

[33] A Yes.

Q That is the reason for the distinction you are making between a tonsilectomy and an abortion?

A Yes. It is also related to the illness model issue: The fact that a recommendation is made because you have an illness.

Q Is it a fair conclusion from what you have said that you also agree that the decision to have a tonsilectomy is thought of by the medical profession as being non-controversial?

A Right now, no. Nothing is.

Q I would like to list some effects which the literature claims can result from an abortion of an unwanted pregnancy in a minor and ask you if you would agree that these are possible psychological effects.

A All right.

Q Guilt?

A Possibly.

Q Sense of loss?

A Yes.

Q Arresting of the development process?

A An abortion?

Q Yes.

A No, I wouldn't think that would be a terribly likely thing.

[34] It is possible, I suppose, but not likely. Pregnancy is more likely to do that.

Q An effect on the minor's dependence or degree of dependence on their parents?

A Again, a pregnancy is more likely to have that effect.

Q In your practice, Dr. Nadelson, could you give me an estimate of the frequency with which you see pregnant minors and in which parental consultation is contra-indicated?

A Okay. Well, let me start out by saying that if I am talking about my practice, I am not going to talk only about my own practice; I am going to talk about what I have more relation to, which is supervising, because that is a broader group and I myself don't see all those many.

Q Please do.

A There, again, I can't give you a percentage figure because it depends a lot on the population that you are dealing with and where they come from. But, for example, if one is working in a private abortion clinic, one is much more likely to have parental involvement possible than in some of the clinic work that we do. A large number of our population don't want to inform their parents. If they do, it is only one they want to tell. [35] They are afraid of the other. A lot of them, if I informed them that they even had to tell one parent, will just skip out, and it is hard to know what they do at that point. I think that it is often a very difficult thing to do. We try to encourage it, but we are dealing with a very complicated problem. If you are dealing with a clinic that has very few resources, you can't possibly have somebody spend

a whole day tracking down parents, because you just don't have the facilities for that. One hopes that that can be done. We try to encourage the teenager to tell her parents. If she can't tell the parents, we offer to tell the parents and try to intervene in some way so that it is not as uncomfortable for her. We offer to sit with her when she does it, if that will make her feel better. There are any number of ways to go about it. You have to have the resources, however, to be able to do that. It is very time consuming and difficult.

Q Now, you listed as one thing that might occur being that the teenager was either afraid of the parents or did not wish parents to know. Would those be reasons why parental consultation was contra-indicated?

A Well, you are dealing with another complicated problem, which is how do you decide when you go against the wishes of an individual to keep something confidential; and, [36] basically, our feeling is that we, under only the direst circumstances, would violate the confidentiality with a patient. So that one wouldn't tell somebody without consent unless it was an emergency.

Q Now, you make that judgment on medical and psychological grounds, is that correct?

A Yes.

Q Now, would you list why parental consultation might be contra-indicated? What reasons would you give for contra-indication?

MS. SCHMIDT: I object. This was all gone into with Dr. Nadelson in her testimony at trial and a determination was made by the Court on this issue.

MR. MEYER: I would press the question.

Q Dr. Nadelson, would you please list the reasons why parental consultation might be contra-indicated?

A Well, I think there are a whole variety of reasons where that might be a problem. With some youngsters relationships with the parents are very bad. Parents may be vindictive or angry or punitive. They may feel guilty and want to project their guilt onto the teenager and punish her because of that.

It is not infrequent to hear a parent say, "It serves her right." I don't really know who it serves [37] right. But, in anger, lots of things like that happen. One may have parents who are disturbed who are in the middle of their own marital difficulties, who may use the youngster as a pawn.

Another frequent problem is when you have parents who are divorced or separated. In other words, one may say one thing and the other may say the other thing. They may fight over this. This may become an issue that they battle as to their concern, and they may not really understand.

There may also be a moral or other position, which isn't necessarily shared by everybody, which they might impose. Generally, you know, some parents are also emotionally disturbed, psychotic even, alcoholics, drug addicts -- whatever -- and, really, they can't make a decision.

Some parents are incredibly narcissistic and really are only concerned with themselves and not really with the welfare of their child or are able to be objective and to try to work out a solution.

Q Now, all the things that you just listed, I take it those are

possible reasons why parental consultation might be contra-indicated, in you opinion, correct?

A Yes.

[38] Q Could you give me, given those reasons and given the discussion we have just had, your best judgment of what percentage of the time for patients that you see and the people who you instruct see that parental consultation is contra-indicated?

A Okay. Let me differentiate something.

Q All right.

A If a minor feels it is desirous, then the question of violation of confidentiality comes out or the pressure or strong-arm tactics, is she decides no. That is a common occurrence, where the youngster feels that she does not want to tell her parents. It is more in some groups than in others. I can't give you an

exact figure because it depends on the age and the situation, the family situation and all those things.

Q Again, I am looking for your best estimate, and if it is necessary for you to break this down by age, that is fine. I'd like to ask you, first, what is your best estimate, and you may give that in any way you can express it, for those in which the child believes it is contra-indicated?

A Generally, this is just a rough ball park figure, because there is no data behind it, other than my clinical impression, but younger adolescents are more willing to talk [38] to their parents because they tend to see themselves as being without any resources, so the chances are they will go to a parent. A 13 or 14-year-old is more likely to go to a parent or close relative, though they may be scared or upset. Often it is late, but they will somehow let that person know.

A 16 or 17-year-old is much more likely, if they feel there is a problem, to decide to take it elsewhere and to deal with friends or other people who are resources, such as teachers or whoever, and to insist on not telling parents. That certainly is a common finding, again, in a cross-population, but it depends a lot on the family structure. That would be a better differentiation than a percent.

Q Are you able to give any estimate as to percentages, or do you feel it just is impossible?

A I really don't think it makes sense to do that. It would just be a total guess.

Q All right.

Now, going to what you have stated is a smaller group -- those for whom it is objectively contra-indicated in someone else's objective judgment -- could you give me any estimate as to

the size of those groups, and, again, expressed with respect to age, if that is [40] easier?

A Yes. That is, again, not as age related because that is related more to the parents, often, than to the children. That is much harder to say. In the private sector it is different than in the public sector. In the private sector it is less likely to happen where that is an objective finding as, you know, somebody knows the family and knows that this is not a possible situation or it is more likely to happen in the clinic population, and, again, if I look at the people, say, in the Children's Hospital, it would be different from the people that we see at B.I. So to give you a figure doesn't take the whole picture into account. I could, roughly, make an estimate. I don't think it would really make sense to make a guess on

that. It is a small percent, in any event, not the same as the other.

Q Would it be under five percent?

A I couldn't say.

Q Could you give any estimates, not for the number as a whole but that number for the components, that is, for those you see in your private practice, for those you see at Beth Israel or for any other particular sub-class?

A I am not clear on what you want exactly.

[41] Q Again, I am asking for the percentage of pregnant minors who have unwanted pregnancies for whom parental consultation is objectively contra-indicated. Could you give me any estimates, not for that number as a whole but for that number, for the sub-class, that you see in your private practice, the sub-class you see at Beth Israel or for any other sub-class?

A All right.

Just in my private practice it probably runs less than five percent. In the clinic it probably runs maybe close to ten percent, but, again, that is really a guess.

Q Would you agree with the statement that: The only problem parental consent requirements cause is the problem of delay?

A That is a major problem.

Q Would you agree with the statement that was the only problem?

A Not the only problem, no.

Q I'd like to read you a quotation from something you have written and ask you if you still agree with this.

A All right.

Q It is an article dealing with teenage abortions and the paragraph starts: "This problem has been brought into [42] sharper focus by the large numbers of out-patient abortion

facilities which do not have adequate pre-abortion counseling and concern themselves with rapid turnover and large numbers of abortions, rather than quality care."

Do you still agree with the substance of that paragraph?

A Yes.

Q Would you tell me why out-patient abortion facilities that do not have adequate pre-abortion counseling cause problems?

A I think mostly the problem is that it is not clear on what basis the decision gets made and I think that is a critical issue. If you don't have a counselor available, you don't know if somebody forced somebody into it or whether they really have thought about it and made the decision. You don't know what other factors are going on in their life that might be critical, in terms of the decision they are making.

Also, I think you find that all people do, but certainly teenagers, are more vulnerable to making impulsive decisions, so that you would want to make sure that the person has thought about it and has weighed the options and has then made a decision.

[43] Q Would you agree with the statement that: Abortion facilities, both out-patient and in-patient, differ in their adequacy of their pre-abortion counseling?

A Sure.

Q Would you tell me why it would be a problem for an out-patient abortion facility to concern themselves with rapid turnover and large numbers of abortions, rather than with quality care? Why would that be a problem?

A It would be a problem because they then wouldn't have adequate resources for counseling and for any kind of post-abortion followup. I am

talking now about it from the physical point of view, more than the psychological point of view.

Q Would you agree as a general principle that a minor's family physician, if she has one, should be made aware of the fact that the minor was pregnant and has had an abortion?

A Again, that is another complicated confidentiality issue and we don't, as a rule, release any records about anything without consent.

Q Strictly as a matter of medical procedure would it be a good idea, if there were no problems about confidentiality of patients or records, would it be a good idea for the family physician to know strictly for future medical [44] practice that the minor has been pregnant and has had an abortion?

A Yes.

Q And the reason you say that you have some reservations or it is

complicated is that there may be some confidentiality problem with the minor not wishing the family physician to know, is that correct?

A Yes.

* * * * * * * *

[45] Q How do you make sure the teenager who has an unwanted [46] pregnancy actually goes to a counselor and receives counseling?

A You can't make sure. You can do the best you can, but that is all.

Q Could parents help in making sure that the teenager got some type of counseling?

A They could, but they often don't.

Q You said, in answer to a question on a different subject, words to the effect that teenagers don't have much of an idea as to where they should go for counseling, is that correct?

A Yes.

Q Would you agree that, for similar reasons, that teenagers do not have much idea of about where to go for abortions?

A They often have more of an idea about that.

Q How would teenagers obtain ideas about where to go for abortions?

A Usually they would ask their friends.

Q Is that the type of decision as to which, again, parents might be helpful in making a teenager decide where to go for an abortion?

A It is certainly possible.

Q You were discussing teenagers' abilities to understand future implications of present acts, and you said that [47] teenagers often have what you described as poor future orientation, correct?

A Yes.

Q How can a teenager understand the implications of surgical and medical procedures, if they have poor future orientation?

A You are not dealing with pure culture; you are dealing with abortion versus pregnancy. So you are not weighing abortion versus non-abortion as the factor. When you are weighing two different cultural alternatives you have to come up with some kind of decision. The future orientation vis-a-vis the continuing pregnancy is far more difficult than vis-a-vis an abortion because the implications are lifelong and unchangeable, and evidence is that people certainly have more effects either from having a child they don't want and trying to bring it up or giving a child up for adoption.

Q Do you agree that the decision whether or not to have an abortion is a decision which has lifelong effects?

A I am not saying it that way. I am saying the issue is the pregnancy has lifelong effects. Having the abortion has some effect, like any crisis people have in their lives, and people have lots of them. Having a pregnancy and continuing is something that somebody lives with the [48] rest of their life.

Q So you agree that if a teenager has a pregnancy and they decide to carry that pregnancy to term that that decision has lifelong effects?

A Yes.

Q And the decision not to carry that pregnancy to term that that decision has lifelong effects?

A Yes.

Q And the decision not to carry that pregnancy to term, therefore, has the opposite of those lifelong effects, isn't that correct?

A It is not simply therefore, no. I said it has a whole different kind of effect on a person. I am talking about a qualitative issue.

Q But the effects of deciding not to have the child are lifelong effects, are they not?

A Yes.

Of deciding not to have the child?

Q Yes.

A Well, it depends. If you are 16, it is very different than if you are 40.

Q I am talking about minors now.

A It would be hardly an issue because they could have lots of children later on.

Q Would you agree that people who have tonsilectomies would not generally have a reaction of guilt over having had their tonsils removed?

[49] A I would say that is probably true.

Q Do you know of any cases where people who have had tonsilectomies have had a sense of guilt with having them removed?

A I haven't had much experience with tonsilectomies, except my own.

Q Now, the psychological effects that can result from having an abortion, you would agree though psychological effects, like guilt and the sense of loss or effects on development, those would not result from having a tonsilectomy, is that correct?

A Well, you could have a sense of loss from having a tonsilectomy.

Q Would that be common, though?

A I don't know that anybody has studied it, but you certainly do with other surgical procedures, such as a gastrectomy or anything like that. It is losing a body part.

Q Would you agree that a pregnant adolescent is a person that,

because of psychological development and family issues which seems to be etiological in a pregnancy, would produce a high recidivism rate? Would you agree with that?

A Yes.

[50] Q Would you describe what ambivalence means to a psychiatrist?

A It generally means having some uncertainty about what one thinks, feels or wants to do about something, a feeling that may be both ways about a similar issue.

Q Does it mean, roughly, the same thing as uncertainty or indeciveness?

A Not quite, because it has more unconscious implications.

Q Is the decision to have an abortion or not to have an abortion an event which usually -- excuse me -- a decision which usually causes ambivalence?

A Again, it is a decision to have an abortion or to have a pregnancy, and people are ambivalent about that for a lot of reasons and in a lot of directions, but people are ambivalent about a lot of things.

Q When does ambivalence reach what is termed "clinical importance"?

A When somebody can't make a decision because they can't settle it.

Q Would you agree with the following statement: The ambivalence of women who have abortions while still planning to have children in the future is of clinical importance?

A Sure.

[51] Q Now, for women, whether they be minors or adults, who have an abortion and still plan on having children in the future, would you agree that that causes conflict?

A No.

Q You would not?

A It depends.

Let me qualify that.

Q All right.

A It depends on what you mean by "conflict." I think I mean something different than you.

Q Conflict has specific meaning to psychiatrists, is that correct?

A Right.

Q Would you tell me what it means as a term of art?

A The term "conflict" in its unconscious meaning has to do with --- It activates some early or other kind of process and may create symptoms or behaviors or whatever. It is not the same as warfare or disagreement. It is internal.

Q Agreeing that in my question I mean conflict in the same way that you just described, would you agree that the decision of a woman who is still planning on having children in the future to have an abortion in the present, that that decision may cause conflict?

[52] A It may, but not necessarily, though.

Q Could that conflict be manifested in subsequent neurotic tendencies or reactions?

A Could be.

Q Would you agree that adolescents tend to show a special intensity and volatility of feeling andn that certain of their emotions are extremely strong and extremely changeable?

A Yes, that is true, but I think it is important to differentiate that one has to be careful about what age adolescent one is talking about.

Q Would you agree with the following statement: Closely allied to his intensity of feeling is the adolescent's need for frequent and immediate gratification?

A I'd make two comments: One is to "his," mostly because the research is on "his" and not "her," so

that the nature of female adolescent processes is less well-known. On the other score, yes.

Q What does "reality testing" mean in psychiatry?

A It means the ability to perceive a situation and realistically assess what its implications are. Usually it is used more related to some psychoses than anything else.

Q Would you agree with the following statement: Reality testing is not as effective in the adolescent as in the [53] adult? An adolescent is particularly likely to be unaware of the probable consequences of his actions and to understand the feelings or behavior of others?

A That is generally more true of adolescents than adults.

Q Would you agree with the following statement: If we examine the failures of reality testing, we find them to be limited to situations

in which the adolescent's relation to a parent or parent substitute is of primary importance?

A That would be hard to answer without knowing the context in which that statement was made.

Q Would you agree with the following statement: There is in adolescence a failure of self-criticism. This is perhaps only a special instance of the failure of reality testing. This quality is best described as an inability to take another person's point of view and to get off and look at oneself. It is one of the factors permitting the adolescents to behave and feel in an impulsive, immoderate and unrealistic way?

A Yes, that is generally true, but not always true.

Q Would you agree with the following statement: The adolescent has an awareness of the world about him different from that of the adult?

A Unawareness of an awareness?

[54] Q Let me start that over again.

The adolescent has an awareness of the world about him different from that of the adult?

A Generally, yes.

Q Would you agree with the following statement: During adolescence the physiological and maturational changes which occur lead to extemely strong emotional reactions and the adolescent lacks experience with her feelings and does not have the emotional control of an adult?

A Again, generally, that is true, but not always, and also for younger adolescents than for older adolescents, as are all those statements.

Q Would you agree that as a general statement the following is correct: What is specific of adolescence is the lessened amount of

adaptive mechanism with which to deal with these problems -- referring to unwanted pregnancies or abortions?

A Could you restate that, please?

Q Certainly.

Would you agree that the following statement is generally correct: What is specific to this age group, referring to adolescence, is the lessened amount of adaptive mechanism with which to deal with these problems -- referring to unwanted pregnancies or abortions?

[55] A There are two different problems there.

Q Would you agree with the first with respect to unwanted pregnancies?

A Yes.

Q Would you agree with the second with respect to the decision?

A It is not as clear.

Q Would you agree with the following statement: When we see an adolescent or young adult we are seeing an individual in painful and extended crisis. In the crisis of pregnancy, the potential for regression or maturation is particularly dramatic?

A That doesn't make sense.

Q Let's break it down.

A All right.

Q Would you agree with this part, first of all: When we see an adolescent or young adult we are seeing an individual in painful and extended crisis?

A All right.

Q You agree with that part?

A Yes.

Q The second part is: In the crisis of pregnancy the potential for regression or maturation is particularly dramatic.

[56] Would you agree with that?

A Yes.

Q In other words, an unwanted pregnancy may present an opportunity for the teenager to mature and it also may ---

A They are not equivalent, though.

Q Let me finish my question.

A All right.

Q Is it, first, possible that an unwanted pregnancy may present a teenager with the opportunity for maturation?

A It may, but is not terribly likely.

Q May the unwanted pregnancy present the teenager with an opportunity for regression?

A More likely.

Q That is more likely?

A Yes.

Q May the decision to carry a pregnancy to term present an opportunity for maturation?

A It might.

Q May the same decision to carry an unwanted pregnancy to term result in a potential for regression?

A Yes.

Q May the decision to abort an unwanted pregnancy result in an opportunity for maturation?

A Yes.

[57] Q And may the decision to abort an unwanted pregnancy result in the potential for regression?

A Unlikely.

Q That is unlikely?

It may occur, though?

A It is possible, but the data is against that.

Q Would you agree with the following statement: Immediately available abortion may prevent some adolescents from accepting the reality of the pregnancy and working through a decision? The implications of this availability include the psychological

toll of the denial, as well as the pragmatic aspect that it may be less likely that a girl who had difficulty acknowledging her sexuality and has denied pregnancy will be able to accept the responsibility of contraceptive use to prevent future pregnancies?

A Yes.

Q You agree with that statement?

A Yes. I think, though, you have to define what "immediately available abortion" means because it comes from the context of abortion without counseling.

Q And when you use the term "iimediately available abortion" what does it mean to you?

A It means somebody walking in and saying, "I want an abortion," and having one right then and there, without having [58] to talk to anybody about it, sort of like: Give me an aspirin.

Q In other words, any medical procedure which involved the administering of an abortion to anyone for any reason would fall into this category of immediately available abortion, correct?

A Let me broaden that because it relates to what we talked about earlier; namely, any procedure of any kind that is entered into without some understanding between the two people of what it is all about is less likely to have consequences and it certainly is likely to have consequences if it involves a decision of any kind and the person attempts to short circuit the decision-making process by making a decision, any decision, as long as it is a decision.

Q So that the medical administering of an abortion to anyone for any reason without proper counseling falls within this category that you describe of immediate available abortion, is that correct?

A No.

Q Would you explain why not?

A All right.

Because immediately available doesn't refer to -- I mean everybody doesn't need counseling. Some people [59] can just sit down and go over what their decision is and some people have done it with somebody else -- they don't need a special counselor. Teenagers are more likely to, because the chances are they haven't had a chance to talk to somebody else about it in some sort of objective way. They don't have those resources available, generally. But, abortion -- You know, what we are really talking about is the just-off-the-street kind of phenomenon, and that one has to have some intervening discussion about something.

Q The off-the-street phenomenon that you describe, that is included

within the phrase "immediately available abortion," is it not?

A Yes.

Q Would you agree that a period of intense anxiety and ambivalence is often experienced in a 24-hour period of time prior to the abortion?

A Yes.

Q Would you agree with the following statement describing ambivalence: Ambivalence is universal. It is related to the conflict between the positive aspects of conception and pregnancy versus the frustration and sadness about making a choice to terminate a pregnancy. Since ambivalence occurs as part of the developmental process [60] of adolescence it is especially prominent in this age group and it is more difficult to assess its particular significance.

Would you agree with that statement?

A Yes.

Q Would you agree with the following statement: For the adolescent's failure of resolution of the unwanted pregnancy crisis can potentially arrest development of progress. The message of pregnancy must be avoided and taken seriously, if repetition is to be avoided. It is important to remember that the pregnant adolescent is a child potentially bearing a child?

A There is a mistype in there.

Q All right. I'm sorry. Let me read it again.

For the adolescent failure of resolution of the unwanted pregnancy crisis can potentially arrest development progress. The message of pregnancy must be understood and taken seriously if repetition is to be avoided. it is important to remember that the pregnant adolescent is a child potentially bearing a child.

A Yes.

Q All right.

Now, could you explain why a failure of resolution of the unwanted pregnancy crisis, why could that [61] occur or how could that occur?

A That could occur if somebody is particularly likely -- if somebody doesn't take the fact of its occurrence as a message, which it usually is -- not always -- it sometimes is an accident, but when a teenager becomes pregnant it is often her saying something about a problem she is having or the family is having or something like that. So that if you short circuit it by doing something, either carrying the pregnancy to term or having an abortion, without understanding what it was about, you are in the same boat you were before, only with more complexities.

Q Would counseling make it less likely that a failure of resolution of the unwanted pregnancy crisis would occur?

A It should, yes.

Q Now, you said that an unwanted pregnancy often carries a message but sometimes is just a result of an accident. Could you describe to me the relative frequencies with which you feel unwanted pregnancies, first, carry a message or, second, are merely the result of an accident?

A I think, from the accident point of view, you really have to look at the failure rate of contraception as one factor. I don't think I have to go into the list of that. You know every contraceptive has its failure rate [62] and each time one has sexual intercourse one runs the same kind of risk, so eventually one is likely to hit the right numbers. That is one factor.

The other factor is that adolescents are less likely to use contraceptives in the first place and so that we have to take those two into account. Again, it is hard to estimate, to give you actual figures, and I can only say that, from my clinical experience, I would probably give a rough 25 percent estimate of accident, at least from the people we see, where there is not much evidence that there is too much else going on. That is, you know, really rough and very general.

The other group of people where, in fact, there are problems of one kind or another and they may be major or minor; it just really is very variable.

Q Would you describe what an "anniversary reaction" is?

A That is a response of some kind. It can be a behavior or symptom or a feeling that occurs on the

anniversary of an important event.

Q Do some minors who have abortions have anniversary reactions?

A That is rare.

Q It occurs?

A It does. It has not been something that is widely reported. [63] It is much more common with pregnancy.

Q Can abortion for a minor result in a withdrawal from social relationships?

A It can.

Q Can abortion for a minor result in preoccupation with feelings of ugliness?

A I suppose so. I don't think it is as likely, again, as the pregnancy to produce that.

Q Can abortion on a minor result in increased dependency on parents?

A Pregnancy is more likely to do that.

Q But the abortion also could do it?

A It could, but it is not one of the big problems.

Q Can abortion on a minor result in radical changes in relationship patterns?

A Yes.

Q Can an abortion on a minor result in a suicide attempt by that minor?

A I am not aware of any reported cases. It probably happens rarely.

Q Can abortion on a minor result in a successful suicide attempt?

A Anything could.

Q Do you know of any examples of that happening?

[64] A No.

Well, we have not had an adolescent suicide related to an abortion.

Q You are saying that you, in your practice, and you, at Beth Israel, have not?

A Not that I am aware of.

Q Are you aware that both suicide attempts and successful suicide have resulted from abortions and that this has been reported in medical literature.

A It has been, but one has to look at where the reports come from and one of the defects in most of the work that reports that is that nobody had any kind of psychological history of the person before, so that it is really hard to say what that was all about.

Q What you are saying, I take it, doctor, is that a minor who has an abortion and then either attempts to commit suicide or does, in fact, commit suicide, that it is difficult to know whether there was a causal connection or not between the two, right?

A I am saying it is unlikely that there is a causal connection.

Q But the causal connection could exist, is that correct?

A Could.

Q What does the term "developmental course" mean in adolescent [65] psychology?

A What you generally mean by that statement is that there is a sort of process that one assumes psychologically occurs and it follows a pattern, and that is what it usually means.

Q Would you agree that abortions can cause adolescents to be thrown off their previous developmental courses in ways which carry ominous implications for their prospects of achieving a consolidated adult integration and regained self-esteem as a woman?

A No.

Q Is that possible?

A I suppose so but I think that would be highly unlikely. It is more likely that a pregnancy would do that.

Q But, again, an abortion might cause that, is that correct?

A It is conceivable.

Q Would you agree that an overwhelming percentage of pregnant adolescents who have had unwanted pregnancies experience moderate to severe emotional distress during the period of pregnancy?

A Could you repeat that question?

Q Certainly.

Would you agree that, looking at the class of adolescents who are experiencing unwanted pregnancies, [66] that an overwhelming percentage report experiencing moderate to severe emotional distress during the period of pregnancy?

A Not necessarily. It is really quite variable. The distress is often after.

Q Would that depend on the definition of moderate to severe?

A Partly it would depend on that, yes.

Q Would you find emotional stress a common occurrence in adolescents who are experiencing an unwanted pregnancy?

A Yes.

Q What would the term "maturational" mean to psychologists or psychiatrists?

A It essentially means moving off the course of the developmental process.

Q Would you agree with the following statement referring to the class of adolescent girls who had unwanted pregnancies: The central emotional issue revolved primarily around their deception of their families and the burden of secrecy?

A That is an important problem.

Q Why is that an important problem?

A A great many adolescents who are pregnant are terrified about what will happen to them. They are also ashamed, [67] often, and embarrassed and guilty and so they feel that they can't communicate.

It is also not uncommon for a family when an adolescent is pregnant to be totally unwilling to communicate about it from the other end.

Q Now, if that secrecy is maintained, I take it that it is likely that the emotional burden of that deception would continue, is that correct?

A Yes.

Q If the parents or the people standing in the place of the parents were informed, could they then reduce that emotional burden?

A What I was getting at is often they are informed and refuse to

talk about it, you know, so just being informed is not enough. They have to be really willing to enter into it, and they may not be able to do it.

Q Would it be a good idea to attempt to reduce the emotional burden of secrecy by attempting to consult with parents?

A Yes.

Q Now, when we were earlier discussing, doctor, the problem of when parental consultation was contra-indicated in the eyes of a minor, as opposed to when it was contra-indicated by some objective standard, I would ask if you would agree with the following statement on that subject: [68] Fantasies about the minor's parents' feelings may be exaggerated?

Would you say that was correct?

A Yes.

Q Would you agree that adolescents who are feeling

particularly guilty may expect severe retaliation from parents?

A Yes.

Q Would you agree that fears of physical violence or beating are often unfoounded fears?

A Not often, but they may be.

Q Would you agree with the following statement concerning adolescents who have unwanted pregnancies: Much of the tension and anxiety for the girl is related to having to tell her parents about the pregnancy?

A Yes.

Q Would you agree that the adolescent who makes her decision in collaboration with her parents is usually the best prepared?

A That is probably true.

Q Would you agree that pre-abortion counseling is a crucial aspect of the abortion procedure?

A Yes.

Q Would you agree that it is not infrequent for an adolescent to be pushed by family or friends to make a decision when [69] she is uncertain?

A Yes, that is true.

Q Would you agree that the counselor must help her to explore the nature of the pressures so that she may make her own decision?

A Yes.

Q Do you agree those pressures by family or friends could either be to have an abortion or to continue the pregnancy?

A Yes.

Q Would you agree with the following statement: Work with the family is important in order (1) to avoid repetition of the unwanted pregnancy, which is most likely a distress signal for the adolescent, and (2) to work out problems reflected by the mutual acknowledgement of the adolescent's sexuality?

A Yes, I think, obviously, it is optimal, but we are not necessarily dealing with optimal situations.

Q Well, that statement is correct as a general matter, is it not?

A Yes.

Q Would you agree with the following statement: The adolescent who is involved in other critical development issues may be desirous of an abortion because her family wants [70] it or vice versa?

A Yes.

Q Would you agree with the following statement: The Supreme Court decision permitting abortion in the first trimester of pregnancy has resulted in a shift from pre-abortion psychiatric counseling to quick turnover at the expense of quality care?

A Could you repeat that?

Q Certainly.

The Supreme Court decision permitting abortion in the first trimester of pregnancy has resulted in a shift from pre-abortion psychiatric counseling to quick turnover at the expense of quality care.

A I think that happened for a period of time after the decision and that seems to be not as much the case any more. Things have settled down.

Q Would you agree with the following statement: Adolescent girls, a high risk population, should experience non-judgmental counseling in order to (1) work through their feeling about pregnancies so that they can reach the best decision for themselves, and (2) cope with stress, guilt and ambivalence they feel, and (3) understand the psychological reasons for their non-use of contraceptives and, thus, avoid future unwanted pregnancies, and (4) [71] improve family relationships, and (5) understand the procedure itself?

A Yes.

Q Do you agree with the following statement: The role of any physician beyond making or confirming the diagnosis should be to explore the patient's feelings and discuss the available alternatives. The patient and her parents should then consider further what decision they want to take, ideally, involving the male partner and his parents?

A That sounds very nice. I haven't seen that happen very often.

Q Would you agree with that statement as being generally correct?

A Yes, it would be nice, yes.

Q Would you agree that, specifically, the physician should explore the patient's feelings and discuss the available alternatives?

A Yes.

Q Do you think that should be done by the physician and not by someone else?

A Well, again, it depends on the situation. Some physicians are better prepared to do that than others, but they are the ones who usually are on the spot when the diagnosis is made and so they can't ignore it.

[72] Q Is the physician the best person, assuming the physician is competent, to do this sort of thing? Is he the best person to do it?

A I don't think so, necessarily.

Q Would you agree with the following statement: Significant people in the adolescent's family must be included in some way in the counseling. Skilled counseling can help the family grow and change?

A Then we are dealing with the problem of the must. It would be nice if one could, yes. If one can do it, yes, they should.

Q If the "must" were changed to a "should" in that quotation, would you agree with it?

A I'd be a little happier with that.

Q Would you agree that dealing with the decision of a pregnant adolescent who has an unwanted pregnancy, dealing with that decision whether or not to carry the pregnancy to term, that decision involves the delicate balancing of risks often requiring the most expert collaborative effort of physicians, psychiatrists and social workers?

A That is a little extreme, I think.

Q Would you agree that it requires expert collaborative effort of trained professionals?

[73] A Well, I think some adolescents can make a decision by themselves or can ally themselves with family members and make a decision. In the decision-making process she doesn't always have a professional involved.

Q Would you agree that for some adolescents with unwanted pregnancies making the decision whether or not to carry the pregnancy to term requires a delicate balancing of risks often requiring the most expert collaborative effort of psychiatrists and social workers?

A I'd go along with "some".

Q Would you agree with the following statement: Emotional counseling is an essential part of care for the woman who elects to terminate her pregnancy?

A Well, again, I don't know whether they mean adolescents or not. I think counseling also is a term we have used a lot, but counseling can be one session and it can be 10 or 20, so it is hard to know. I don't think everybody needs to see somebody over a prolonged period of time.

Q Would you agree with the following statement: Emotional

counseling is an essential part of care for the adolescent who elects to terminate her pregnancy?

A I think that is more likely to be true.

Q That is, at least, true most of the time, is that correct?

A Yes.

[74] Q Would you agree with the following statement: Appropriate psychological interventin during pregnancy and in the post-abortion period may provide the impetus for maturation to the next developmental stage and more responsible behavior?

A Yes.

Q Do you agree with the following statement: The request for abortion or the abortion itself may represent an opportunity for simple psychotherapeutic intervention which may be of vital importance to the woman's subsequent mental health?

A Yes.

Q Would you agree that it is often younger adolescents who delay the decision whether or not to have an abortion or whether or not to carry the pregnancy to term?

A Well, to backtrack, what tends to happen is the delay the acknowledgement of the pregnancy and then they continue to delay and, generally speaking, younger ones do more of that than the older.

Q By the way, we have been discussing abortions and I have been using the term to mean first trimester abortions. I assume you have been meaning the same thing, is that correct?

A Yes.

[75] Q Is it a fair statement that second and third trimester abortions entail greater medical and psychological effects than first trimester abortions in general?

A Let's discount third trimester. Second trimester abortions do have greater medical risks and, interestingly enough, despite the feeling that they should have greater psychological risk, the evidence doesn't bear that out.

Q Why do you exclude third trimester procedures?

A Well, in the first place, they are illegal and nobody does them. Nobody does third trimester abortions around here, at least in any hospital or clinic that I know of.

Q Are you familiar with the testimony at the first trial about the operational procedures followed by Parents Aid Society and counseling and administering abortions?

A I was not at that session of the trial.

Q Are you familiar by any other means of knowledge about the operation of the Parents Aid Society in the counseling and administering abortions?

A Only generally. I don't know the details specifically.

MR. MEYER: Off the record.

(Discussion off the record.)

Q I asked you questions earlier about recidivism. Do you know what the recidivism rate is for teenagers who have one abortion to have another abortion?

[76] A The figures on that are really not very good.

Q Do you have a best estimate?

A They range, depending on whose study you read and what area of the country and which clinic, and it is really not good because the followup is very difficult.

Q Do you have an estimate of what you think the real number is as to recidivism for abortions in teenagers?

A Well, let me put it in terms of for repeated pregnancy, because that is more available and clearer,

and their estimates range between 20 and 95 percent. It roughly is somewhere around 25 percent in our clinic.

Q So the range of 20 to 95 percent represents the range of estimates are made by people who study it and you would agree that the number is somewhere in that range, correct?

A Right.

Q And 25 percent is the number that you see in your clinic?

A That is roughly what we seem to be seeing.

Q Were you talking here about repeat abortions?

A I am talking about pregnancies.

Q We are talking about repeated unwanted or repeated ---

A Repeated unwanted pregnancies.

Q The 25 percent was for Beth Israel?

A Yes.

[77] Q Do you have any idea, leaving aside the patients you see in your practice and Beth Israel, what your best estimate would be for the number nationally or the number in the state? Would you have any estimate, independent of that number?

A My guess would be that if you took all of the studies and put them together it would come out to be about in that range.

Q Again, 25 percent?

A Roughly. There really are probably better data available than I have at my fingertips.

Q I asked you a question earlier about directive and non-directive counseling and you gace an answer which said that, generally, counselors should not attempt to impose their views on the people they are counseling, as a general matter. Could you explain why that is correct?

A Well, I think that the issue involved in counseling, sort of the premise on which it is based is you have an objective outside person who doesn't have an axe to grind or a direct involvement in the situation, who can help clarify the issues and understand what the options are and help somebody work that out, without being emotionally invested in one decision or another.

Q What does that mean, or how would that -- what would be [78] an example of that?

A An example would be a parent, for example, who did or didn't want a pregnancy to continue. It would be hard for them to be very objective, if they had a bias about it.

Q It means a person who wants one outcome or the other?

A Yes, and somebody who is trained, even if they have an opinion, and most people have an opinion about

it, and certainly it is very hard when you see a pregnant 13-year-old to not form an opinion on about what you think, but a trained counselor, presumably, does not let that opinion interfere and can be objective.

Q And, presumably, also does not let that opinion show to the person being counseled, is that correct?

A Right. Right.

Q Would you agree that most minors, whether or not they have unwanted pregnancies, need counseling in general?

A No.

Q You wouldn't agree with that?

A No.

Q Would you agree that most minors who have unwanted pregnancies need counseling?

A Yes.

Q Would you agree that all minors that have unwanted pregnancies need counseling?

[79] A Again, it depends on your definition of "counseling." I think all of them need one session where somebody can assess the situation. Some people would call that counseling. Other people would not call it counseling, unless they saw someone one, two or three times.

Q But you would agree that all, at least, need that one session that you are describing?

A Yes.

Q Would you agree that the mere fact that a pregnant adolescent with an unwanted pregnancy that appears to show understanding of what is going on, does not, necessarily, mean that they do not need counseling?

A Yes, I think that is true.

Again, that would be with the qualification of what you mean by "counseling." That fact that they become pregnant in the first place often means something and you need to

assess, even in that interview, whether or not it was because it was an accident or not or why they were or weren't using contraceptives.

Q Do you think it is good medical practice for a doctor to perform a surgical procedure on a patient he has never seen before?

A No.

Q Do you think it is good medical practice for a doctor to [80] accept a patient's signature on an informed consent form if he has neither discussed that form with the patient nor witnessed the signature?

A I think that is a complicated issue, partly because it depends on the procedure and it depends on what the nature of the contact is. I mean if somebody ---

Well, I think what I am getting at is there is an issue of the contract and it depends on what you are doing. If you are operating in a clinic, say

in a group practice of some kind or in a clinic, the physician may be in the employ of the clinic and then not the responsible party, because the clinic is -- that person is the responsibile party, technically; but what I am getting at is the relationship may be with the clinic and not with the physician. The physician is operating as a technician, basically, but the real ongoing relationship may be with that clinic, which I have no feeling about, but that seems to be the way things go. So that qualification is in there. You can do an appendectomy that way and you can give pills that way and you are performing a service on not somebody who you necessarily have an ongoing relationship with.

Q In your opinion should a physician establish a physician-patient relationship before either diagnosing or participating [81] in any medical or surgical procedure?

A That is my personal view. That is not, necessarily, widely held.

Q I take it that the situation you are describing where the physician is merely a technician and it is the clinic that has established the relationship with the patient, that is the situation which you personally do not think is optimal?

A Right.

Q Why is the physician-patient relationship important?

A Well, there are a lot of issues that involve both people, but, as a physician, I don't like to view myself as a technician. That is not why I am in it. It is because I really want to be involved with the person that I am seeing.

I also don't feel comfortable doing something ---

Well, frequently, in fact, I am asked to sign prescriptions. I won't sign a prescription unless I either

know the person who supervised the person or have some knowledge of what is going on. I don't personally like to do that, from my point of view or from the physician's point of view. From the patient's point of view I think every person is different and has their own way of doing things and I think it is very dehumanizing to [82] be in the situation where you are just sort of acted upon and you are not involved as a person.

Q What effect would the presence or the absence of a physician-patient relationship have upon the provision of medical care?

A I think it really depends a lot on the bias of both parties. It depends on the model in which you grew up.

I mean I, personally, would not feel comfortable not having a personal relationship with a physician, not really knowing who they were. I just

wouldn't do that. A lot of people who grow up in a different kind of model really feel quite comfortable that way.

Q Does the term "episodic medical treatment" have any meaning to you?

A Yes.

Q What does it mean?

A It means generally people who don't follow through and come in crisis, but don't have ongoing relationships with either a physician or a clinic.

Q What are the medical problems that can result from episodic medical care?

A Well, what it means is that a person comes without a history and so you have no, you often have no idea, or they see you only in crisis and so you have no chance to [83] do any preventive work. A person who comes, you know, can have a serious disease that you might miss, if they have only

episodic care, because you wouldn't know of a past history or anything whatsoever from the point of view of the patient and it really is a very poor thing and, from the point of view of the physician it makes the physician less effective.

Q I take it that it is correct, is it not, that if parents are made aware of the fact that their minor daughter has had an abortion, that that information can be relayed to the family physician?

A Not unless the person involved gives permission.

Q If we ignore the problems of whether the minor patient does or does not give consent for this information to be disseminated, as a purely medical matter would it be a good idea for the family physician to know that?

A Oh, sure.

Q Would it be a good idea for the doctor performing the abortion to

have the most complete medical record in existence on the patient available to him?

A Well, generally, it would be very helpful.

Q You have distinguished in many of your answers to my questions between the permanent effect of carrying pregnancy to term and the permanent effect of having an [84] abortion, is that correct?

A Yes.

Q Would you explain to me why having an abortion has different permanent effects, whatever they may be, than carrying a pregnancy to term may have?

A That is a large issue. Basically, and I think this is very critical, a pregnancy is nine months of living with what has happened and of having it change your life in a major way and of making some kind of decision at the end of it about where

else you are going, and people become, obviously, involved. It is a major physiological shift. It presents people with all kinds of complicated psychological issues. They have to, at the end, decide whether they are going to continue and bring up a child, which is a whole other course of life, or give up the child, which really has major implications, in terms of their feelings about the attachment that they form during the process of pregnancy, et cetera. An abortion is really, by most people, seen as a procedure that brings relief. The general data is that most people feel relieved after an abortion. Some feel a little bit guilty, but you feel guilty about a lot of things you do. The issue is not a major one. People don't often conceptualize a pregnancy that ends in abortion the same way, [85] partly because it is so early most of the

time, but also partly because they haven't lived with it for all that time and they haven't really had to deal with the whole process of change that occurs. So that you will generally not find anything like the same responses.

Q Why is it important how the person conceptualizes a pregnancy?

A Excuse me.

Q You mentioned in your answer to the last question that the length of time a person is pregnant before the abortion takes place, affects how they conceptualize the existence of that pregnancy. What difference does it make?

A If you are pregnant for six weeks, you are not feeling very much other than a few changes in symptomology that may have occurred in other times of your life. Also, you know, if you are nauseated or whatever, you have had that experience

before, but when you start to feel a quickening or start to change in body shape, that is something that you have experienced before, is it is your first pregnancy, and it certainly is a very different kind of experience and means something different because you know what is going on at that point. Before that most people don't pay terribly much attention, particularly [85] if it is unwanted.

Q Now, what I am asking you now is why is it important how someone conceptualizes a pregnancy? What effect does it have that they conceptualize it one way or the other?

A I really am not clear on what you really want.

Q All right.

You mentioned in answer to my question that the timing of the abortion, if it occurs, can have an effect on how they conceptualize a pregnancy. What I am asking you is

what does it matter how a person conceptualizes their pregnancy, or, in other words, what effect does one conceptualization have as opposed to another?

A Well, if somebody is six-weeks pregnant, they, you know, may be aware of it, but they don't necessarily feel, that they are having a child and they are not thinking of it in those terms. If they are 25-weeks pregnant, they certainly do begin to become more aware of it and they are making a very different kind of decision then because there is no way you can deny that or not deal with it or not feel it, because something has in a major way changed in your body.

Q I'd like to ask you a few questions, doctor, about situations in which the parents want one decision to be made [87] and the minor wants the other decision to be made. Is it

true, first of all, that in most cases of parental disagreement with their minor's initial decision that it is the parents who want the abortion and the children, the child, who wants to carry the pregnancy to term?

A No, it is really quite variable.

Q Is that true for most pregnancies under the age of 15?

A That is really very hard to say. I think it is quite mixed. It really depends a lot on where the parents are coming from and where the teenager is and, you know, I can't give you any figures on that.

Q What you are saying is that it is really variable and that sometimes it is one way and sometimes it is another. It really depends on which population you are talking about and what the circumstances are of the family and what their values are.

Q All right.

If I am talking about the population of all pregnant 14 and 13-year-olds who have unwanted pregnancies -- that class -- that class of adolescents where the adolescent and the parents disagree -- is it true that in the majority of those cases it is the parents who want the [88] abortion and the child who wants to carry the pregnancy to term?

A Again, it is not really a valid kind of an issue, you know. It depends on whether they live in Boston or Somerville or whether they are Catholic or not Catholic or how financially well situated the family is and how many other children there are and who is sick in the family, you know.

Q You understand I am asking about all of them, whether they live in any particular place?

A You can't generalize because you are dealing with totally different situations.

A I don't think it is a known answer. I don't think anyone can give you that.

Q Do you know the answer to the question or would you know the answer to the question if I were talking about 15, 16 or 17-year-olds?

A No, I think anybody who would give you an answer would be just giving you a guess on that because there are no figures.

Q Is it true that it is extremely common for pregnant teenagers who are 13 and 14-year-olds who have disagreements [89] with their parents, that those disagreements would be in the direction of the teenagers wanting the child and the parents wanting the abortion?

A Again, you know, they might, and it depends also on how much they have really thought through what they really are saying. I mean some teenagers say they want a child

because they want a doll, and that is really what a baby amounts to, and if one has some counseling one can claify what they are really talking about.

Q Now, would you agree as a general statement that the teenager with an unwanted pregnancy is carrying some kind of psychological weight or burden in making the decision whether to terminate the pregnancy or continue?

A Yes.

Q Would you also agree that in the majority of cases consultation with the parents can lighten or ease that burden?

A Well, again, I can't say the majority. It would ideally be that way, but sometimes it makes it worse.

Q Do you know either way whether that is true of the majority of cases or whether it is less than 50 percent?

A I would say, obviously, probably more often it would be a good

idea and it would make it easier, but that is, again, not always true and it depends on which population [90] you are dealing with.

* * *

[Title omitted in printing]

Deposition of Carol C. Nadelson

Continued deposition of CAROL C. NADELSON, taken pursuant to Notice before Barbara Sakurai, Notary Public, at the offices of the Attorney General, One Ashburton Place, Boston, Massachusetts, on Friday, August 5, 1977, commencing at 9 a. m.

SECOND DAY

* * * * * * * *

[3] MR. MEYER: For the record, this is the continued deposition of Plaintiffs' witness, Dr. Carol Nadelson. My name is Michael B. Meyer. With me is Larry Gotlieb.

Also present are Brian Riley, counsel for defendant intervenors; the

witness, Dr. Nadelson, counsel for the plaintiffs, Joan Schmidt and her associate, Rickey Klieman.

CAROL C. NADELSON, a witness called by and on behalf of the defendants, having previously been sworn deposes and further says on her oath as follows:

DIRECT EXAMINATION BY MR. MEYER, CONT.

Q Dr. Nadelson, I'd like to start out today by going back to one thing that you discussed on Wednesday. You indicated on Wednesday that informed consent for a 10-year-old might involve a lower degree of understanding than informed consent for an older adolescent or an adult. Do you remember that general exchange?

A. Yes.

Could you explain why an informed consent for a 10-year-old might involve a lower degree of understanding than informed consent for an older adolescent or for an adult?

[4] A All right.

Basically, it has to do with the cognitive and emotional capacity of a 10-year-old versus 13-year-old or a 15-year-old, and I think it is a complex problem because you are dealing with a process which I think most of you lawyers like to define more specifically than it is definable. Basically, however, a 10-year-old has a different capacity for integrating information.

Q And that is what you refer to when you say "cognitive capacity"?

A Yes.

Q In other words, what you are saying is that because a 10-year-old has a lesser ability to integrate

information or has a lesser cognitive capacity that, therefore, the level of understanding required for informed consent is lesser for a person of younger age?

A Well, it is not exactly that. Let me see if I can try to explain the concept.

Q Please do.

A What you are dealing with is a person who tends to see things more concretely in terms of what their capacity for understanding is; therefore, an issue that would be clear to you would not be clear in the same terms to a 10-year-old, and what they would focus on would be [5] different because they would be concerned about something that is different than what you would be concerned about.

Q Is it, therefore, true that if you were informing a 10-year-old in an attempt to explain a particular

proceudre to the 10-year-old, that you would discuss different subjects and discuss those subjects in a different manner than if you were discussing the same procedure with an older adolescent or with an adult?

A Yes.

Q And would you discuss these different subjects at a lower level of complexity?

A Well, again, it is sort of a value judgment whether you consider it lower or different. It is not -- for example -- age is not sometimes the only factor. I mean there are a lot of adults who think concretely, too, and what you need to do is have some sense of the way that individual sees something before you can proceed to explain what you would like.

Q Now, the different cognitive capacities that people have at different ages, does that imply a different type of understanding or a different degree of understanding?

A It would certainly be a different type and a different degree and issues would be looked at from a different perspective.

[6] Q When you are dealing with, say, a 10-year-old or a 12-year-old and you feel that there is a different degree of understanding of a lower degree of understanding in that 10 or 12-year-old, would you, as a doctor, require a parallel informed consent by that child's parents?

A Well, again, that is a complicated issue. You would certainly want that to be the case. Sometimes the parents don't understand it much better. One would, hopefully, not involve a child without some more responsible person. However, that is not always possible.

* * * * * * * *

[10] Q Let me read you one quote, doctor, and ask you if you agree with the general tenor of this quotation: "In an [11] attempt to obtain accurate data on recidivism it became clear that previous pregnancies are often not reported retrospectively, especially if another hospital was used for prenatal or surgical care or if an illegal abortion was performed. Attempts to continue to follow patients as Sarrell had done were not successful because 50 percent of adolescent abortion patients do not maintain contact with the clinic."

Do you agree with the general substance of that quotation?

A Yes.

Q Do you agree with the following quotation: "It is certainly axiomatic that an adolescent is best off in a family receiving the support and guidance of concerned and devoted parents"?

A Yes. That is the best of all possible worlds.

Q Let me ask you if you agree with this quotation: "It would be, indeed, preferable if teenagers confided in their parents and obtained their support and help under circumstances of mutual trust and openness"?

A Yes.

MS. SCHMIDT: I object to this line of questioning. This was extensively gone into at the first trial and every expert agreed that parental support was certainly [12] invaluable and the desired results.

Q On one statement we had, Dr. Nadelson, you said that teenagers would probably consult with their friends concerning the decision of where to go to obtain an abortion. Do you remember that line, generally?

A Yes.

Q Do you think that peer groups provide an appropriate source of information for the decision of where to go for an abortion?

A That is variable. It really depends on what subculture you are dealing with and what age group you are dealing with. Certianly, if you are thinking of an adolescent who is older, who is 17 or 18, their peer group may know a hell of a lot more about this than their parents or anybody else.

Q Do you think it makes a difference where a pregnant teenager with an unwanted pregnancy goes for an abortion?

A Where?

Q Yes.

A Sure.

Q In other words, different hospitals and different clinics differ and vary in their abilities to both counsel and perform medically correct procedures, is that correct?

A I think that is less true now than it probably was two [13] or three years ago and I think when we talk about medically correct that I am taking that in the larger sense of medically, in other words, not technical performance but the entire ambiance.

Q And given that reservation about the meaning of the words medically correct in that question, you would agree with that statement?

A Yes.

Q Would you agree with the following statement in the literature, doctor: More recent studies fail to show significant differences in obstetric complications or outcomes for adolescents when more comprehensive obstetric care was provided?

A I am not an obstetrician. I can't answer that.

MS. SCHMIDT: I would object to the form of that question. More recent studies than what?

Q Doctor, when you made statements to the general effect that better prenatal care would reduce the amount of obstetric complicationsd that were encounteres by the adolescent that was pregnant -- do you remember that general statement?

A Yes.

Q Would you agree that the medical literature fails to disclose any difference or any significant difference in [14] the rate of obstetric complications when the level of obstetric care was improved?

A I'm not familiar with obstetrics. I couldn't answer that.

Q Also, doctor, you were discussing the gernal subject of the fact that the majority of cases in which a teenager had an unwanted pregnancy, that in those cases this

was a signal that something was wrong and that in only a minority of the cases could this be described as an accident. Do you remember that general subject matter?

A Yes.

Q Would you agree with the following quotation from the literature: "For many adolescents, particularly those 16 years of age or older, pregnancy is not associated with serious social or psychological pathology"?

A I wouldn't agree with that.

Q Would you agree with the following statement: Failure to involve parents in the abortion crisis only serves to further dissolve the integrity of the home and to promote permissiveness and promiscuity?

A No.

Q Would you agree with the first part of that statement, and let me read the first part to you: The failure to involve parents in the

abortion crisis only serves to further dissolve the integrity of the home?

[15] A Well, that is presupposing that it is integral, and I think that is a supposition I couldn't make.

Q If we were dealing in a situation where the home had some integrity to begin with, would that first statement be true?

A Well, then you would cut out the major portion of those in the situation, and you would be dealing with another group of people, the minority group, so that would hold, if that was the group that you were dealing with.

Q So that statement would be true for the group of families which was not completely dissolved or completely disintegrated to begin with?

A Yes.

Q Would the involvement of parents possibly serve to improve a family situation that was already dissolves and disintegrated?

A It could.

Q Do you think all teenagers who are experiencing an unwanted pregnancy have the capacity to make a good choice about where to go for an abortion?

A They don't all have the appropriate information that would enable them to make that choice.

Q If they all had the appropriate information, would they then all have the capacity to make that decision?

[16] A I couldn't answer that question.

Q What criteria do you believe should be used by either a teenager or by her parents who was making the decision in choosing a place to go for an abortion?

A Well, I think, again, it depends on the resources that are available to one. If one lived in the Boston area, it would be different than if one lived in another place, but if one was accurately investigating the situation I would, you know, look differently than probably other people would, because of my background being different, but I would, roughly, look at the quality of the medical care in the narrow sense of medical, as well as the counseling resources of that particular place and what would be available. I would also look at what kind of emergency facilities were available before I would make a choice.

Q So you would investigate at least three things, that is, the level of medical care, narrowly defined; the amount of counseling and the availability of emergency facilities?

A Yes. Obviously, there would be other things. I would be less concerned about costs and things like that, but I don't think it would be a general truth.

* * * * * * * *

CROSS EXAMINATION BY MR. RILEY

[17] Q Dr. Nadelson, at Beth Israel are there counseling procedures or do you counsel other types of medical procedures?

A Yes, except that the procedure is a little bit less formal or organized for most procedures. An attempt is usually made, but it is notwithin the same structure as it would be with regard to --- Generally the OBGYN Department does more of it than most of the other medical departments.

Q You were talking abut an organized counseling procedure?

A Yes.

Q Could you describe that more, please?

A Well, for example, what we do with teenagers is spend more time with them discussing what it is they are doing, you know, in terms of this specific issue, that is, with an unwanted pregnancy. We do have a formal procedure where they do see somebody who they can talk to about it, in terms of their decision-making. That is also true for [18] people requesting sterilizations or procedures where there are emotional issues or where decision-making is somewhat improtant, more critical.

In other situations, for example somebody who needs surgery for cancer, they would be counseled and the physician seeing them, in talking about a procedure, would ask someone else to see them, if they felt that

they may be making a destructive or detrimental decision, and try to make sure that they were clear on what decision they were making.

Q Now, is this confined to adolescent counseling, that which you just discussed?

A The adolescent counseling part really has to do with unwanted pregnancies. In other wods, we don't do an abortion on an adolescent who hasn't at least talked to somebody in that area who felt comfortable with the fact that they had thought it out and they knew what their options were. That would apply for adults and adolescents with a great many procedures.

We see a lot of young people, for example, in their early twenties, who request sterilization. Most of the gynecologists would prefer to have them see somebody before they would do the procedure because they don't feel

comfortable doing a permanent procedure on [19] somebody who they feel might change their mind.

Q If a minor sought a sterilization procedure, would that minor be counseled?

A Yes.

Q I gather that you are saying that where there are emotional implications to a procedure, medical procedure, there is counseling?

A Emotion or serious medical ones. I am thinking again of a person with cancer who decides not to have surgery. Most of the medical people would ask somebody to come and talk to them to make sure they were aware of what the implications of the decision would be.

Q During the course of counseling is there any discussion o the personal history of the minor?

A Usually of anybody.

Q And is the psychological history of that minor's upbringing important?

A Yes.

Q And is that discussed?

A One would want to know for anybody, anyone who was counseling, an adult or a child, you would want to know something about where they came from, what their family was like, what problems they had with their family or with their background, whether they had serious illnesses of [20] one kind or another, including psychological or medical. It is an assessment that one sort of routinely does psychologically. it is kind of taking a history, just as one would take a medical history.

Q Is that information obtained solely from the child?

A Usually not. Usually parents or guardians provide some information, and this, again, depends on the age of

the person. That also would be true of adults. The person making that assessment has to use their clinical judgment about what information is important, so that you might be seeing an adult and you might want to check out certain aspects of a history with a spouse or a friend or a sibling or a parent, and you might request permission to see that person.

Q Is the religious or moral or ethical background of a minor important, in terms of counseling?

A Yes. One usually asks questions about how they feel about any kind of procedure. Obviously, with some issues there are more implications than for others and people generally ask a general leading question, which the person can then pursue.

Q What leading question would that be?

A Well, for example, if someone is seeking an abortion and I notice on their record that they are Catholic, or such [21] information is usually available from the hospital record, I would ask them what this decision meant in terms of their religious or ethical position. I would ask it, obviously, not only if they were Catholic, but that would certainly be a flag in terms of my asking them if they taked to anybody at the church about any of the issues. It is amazing the answers you get to those questions.

Q Do you consider the answers to these questions -- the personal history and psychological background and religious and moral factors -- do you consider that improtant in evaluating the minor child?

A Yes, because it has to do with -- and maybe it is important to differentiate here -- but it is not

only used for the decision-making but for some understanding of what repercussions it might have for the future. In other words, you might expect somebody who has had a background of seeing abortion, say, as immoral, and then makes this decision, which is just a recent study which makes some interesting points about this. But if that person makes a decision I might want to know a little bit more about that because I might expect that they might have some feelings about it later, not that I wouldn't think that their decision was valid. I think they could be making it, but they might feel more guilty than someone who [22] doesn't have that concern. The same would go, say, for sterilization.

Q Well, specifically what type of individual would feel more guilty, perhaps, later on?

A A person who has grown up feeling, say, using again the issue we were talking about, a person who has grown up feeling abortion is immoral or wrong and it is clear that they feel they cannot continue the preganancy, and then they make the decision. That might be more ambivalent than someone who has not had that position, you know, and has not thought that way. So they might feel a little more uncomfortable. They also may get less suppoort from their family or friends and may need somebody else to talk to who is more neutral about the situation.

Q In the situation where a minor child is not capable of giving an informed consent and refuses to inform their parents, how would the decision be made as to whether or not the child should have an abortion?

A That is a complicated issue because we don't see that, you know, really essentially in the first

place. If somebody usually comes to us, they usually have made a decision or have approached it a certain level, and they don't come to the hospital or clinic unless they [23] have gotten to a certain place. So that it would be fairly rare. I can recall of very few instances where, because somebody was retarded or seriously disturbed or something like that, where the question was raised, you know, or where somebody had a serious medical problem and people wondered if they could even carry through a pregnancy, and that person may not have understood what that was all about. That is a whole different thing and a very small minority of the cases we see.

Q In that small minority who would make that decision?

A What happened, and I can't give you the details of the case because I am not familiar with it, but

we have seen maybe two or three times in ten years that I can recall -- I am not familiar with every case that goes through -- but what happened is say somebody has a serious medical program [sic] and the physician feels that an abortion is indicated because the person might not live through pregnancy. A major party may have cancer or something like that. The person either isn't aware of it or doesn't take it seriously or, for whatever reason, you feel that they are not capable of being informed. You might request a legal intervention, and I am totally unfamiliar with all those steps because that never gets handled at our level. It gets handled by the hospital administratively.

[24] Q Would the ultimate legal intervention be court approval of the procedure?

A As far as I understand, yes, but I haven't been involved in that aspect of it.

Q Would you agree with the statement that adolescents can exhibit maturity on one day and be immature on another day or at another period of time?

A Oh, sure.

Q Does that enter into your evaluation of the maturity of the child?

A Yes.

Q Again, somebody who is somewhat skilled at working with adolescents can automatically take that into account in discussing it and, generally, in a serious issue somebody who knows how to interview an adolescent will be able to get the best level out of them in some way. If you can't on one day, you might, in fact, want to see somebody again the next day or something. We frequently do that.

Q All right.

So, for example, a 17-year-old minor girl could come in and be quite mature and appear quite mature on one day and act very immature on the following day?

A Yes, but, generally speaking, with regard to serious [25] decisions, that immaturity is more at the level of other kinds of interactions. I don't know if I am being clear about it. When somebody is faced with a serious decision, you see, you may get some superficial immature appearing behavior, but if one can cut through that -- usually you can get what they are capable of in one way or another, and that is obviously not always true -- but, say, an adolescent is faced with --

Okay. Let me give you an example of the DES business, because that has been an interesting and problematic area, where consent is a problem. You

might get a 14 or 15-year-old who had a DES exposure in uteral where a pelvic exam is really very important and they need to be followed, and a 14-year-old might not have the foggiest idea about this and not want to be involved, and it may take a little bit of time for somebody to explain what the issue really is and why. Interestingly enough, I think in that example very often parents aren't terribly helpful with it because they are so emotionally involved and often so guilty about it that you often do need somebody else to help with the explanation in dealing with the situation.

MR. MEYER: Excuse me. May I just for the record ask you to explain what the DES problem is so that [26] this answer is made clear as to what it refers to?

THE WITNESS: That is the situation where the mother was given diethylstilbestrol during pregnancy to

prevent an abortion and what the literature indicates is there is some risk of vaginal agnosis and carcinoma in the children and so they require some fairly careful followup with repeated pelvic exams at an age that other adolescents might not have them.

MR. MEYERS: Thank you. I apologize for the interruption.

Q We talked earlier about the problem of recidivism on the repeat abortions. How do you know a child or a minor is a repeater?

A How do we know?

Q Yes.

A You mean medically?

Q No.

Medically, how do you know that a child is a repeater?

A All right.

The only way you know is if they tell you, as far as I know. I mean I am not a gynecologist so I couldn't tell you if there are other signs and

symptoms, but usually you can only tell from my perspective by the [27] history you get either from them or their family.

Q Is there any medical society that is concerned exlclusively with abortion-related mental practice?

A Medical society?

Q Yes.

A Not as far as I know.

Q Are there any universally accepted or universally approved medical guidelines for abortions on adolescent girls?

A I couldn't really answer the question because that would be more in a gynecological sphere.

Q Are there any, in terms of psychiatric counseling?

A Not any formally agreed upon guidelines. I think most people working in the area would roughly follow a similar procedure, but there is no formal procedural code.

Q Are there accepted guildelines for other types of psychiatric counseling and care?

A Some, you know, areas, like shock treatments or whether somebody is capable or whether somebody can be committed -- those kinds of things -- but not generally in too many other areas. There are ethical guidelines for those kinds of things.

Q There are no guidelines concerning exclusively counseling minor girls who might want an abortion?

A No.

[28] Q Do you feel that the best solution to an unplanned pregnancy is an abortion for a minor girl?

A I think it really depends a great deal on what the individual situation and desires are. Some adolescents, you know, want to have a pregnancy and want to continue it and it may make sense for some.

Q Do you feel that an abortion is an elective procedure then?

A Elective?

Q Yes.

A Oh, yes.

Supreme Court, U. S.
FILED
SEP 25 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-329, 78-330

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts;
GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys of all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated, Appellants in No. 78-329
JANE HUNERWADEL, for herself and all others similarly situated, Appellant in No. 78-330

v.

WILLIAM BAIRD; MARY MOE; PARENTS' AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated, Appellees in Nos. 78-329 and 78-330

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM AND BRIEF

JOSEPH J. BALLIRO
JOAN C. SCHMIDT
One Center Plaza
Boston, Mass. 02108
(617) 723-1980
Attorneys for Appellees

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JANE HUNERWADEL, for herself and all others similarly situated, Appellant in No. 78-330

v.

WILLIAM BAIRD; MARY MOE; PARENTS' AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated, Appellees in Nos. 78-329 and 78-330

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Appellees respectfully move this Court, pursuant to Rule 16(1)(d) of the Rules of the Supreme Court of the United

States, to affirm the judgment of the three-judge District Court upon the ground that the parental consent requirement of the Massachusetts abortion law, Massachusetts Gen. Laws ch. 112 §12S, is unconstitutional and inconsistent with *Roe* v. *Wade*, 400 U.S. 113 (1973), *Doe* v. *Bolton*, 410 U.S. 1979 and *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976).

Respectfully submitted:

JOSEPH J. BALLIRO
JOAN C. SCHMIDT
Attorneys for Appellees

In the Supreme Court of the United States

OCTOBER TERM, 1978

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF IN SUPPORT OF MOTION TO AFFIRM

Appellees respectfully submit this brief in support of the motion to affirm.

Citation to Opinion Below

The opinion of the three-judge District Court has been officially reported as *Baird* v. *Bellotti*, 450 F. Supp. 997997 (D. Mass. 1978) and is set forth in Appendix A of appellants' jurisdictional statement.

Jurisdiction

Jurisdiction to consider the appeals is admitted.

Questions Presented

I

Whether Massachusetts Gen. Laws ch. 112 §12S, which prohibits physicians from performing abortions on unmarried minor women without either parental consent or judicial consent with notice to the parents, is unconstitutional on its face.

II

Whether the District Court should have permitted the Bellotti defendants to conduct a survey of health care facilities.

III

Whether the District Court should have rewritten Massachusetts Gen. Laws ch. 112 §12S in such a way as to limit its application.

IV

Whether the District Court erred in ordering the defendants to pay plaintiffs their costs.

Statement of the Case

The respective jurisdictional statements set out the facts with substantial accuracy.

Argument

Prior decisions of this Court have accorded to minors certain Constitutional rights. Among these rights is the right to privacy. *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976). The right of privacy as construed by this Court encompasses the right of a woman to terminate her pregnancy in consultation with her physician. *Roe* v. *Wade*, 410 U.S. 113 (1973). State interference with the constitutional rights of minors must promote a "significant state interest," *Carey* v. *Population Services International*, 431 U.S. 678, 693 (1977); must not be unduly burdensome, *Baird* v. *Bellotti*, 428 U.S. 132 (1976); must be implemented by legislative enactments . . . narrowly drawn to express only legitimate state interests . . .", *Roe* v. *Wade*, *supra*, at 156; and must be the least obtrusive alternative.

The Court below correctly applied the above decisions. The District Court properly found that the Massachusetts statute as interpreted in *Baird* v. *Attorney*, — Mass. —, 1977 Mass. Adv. Sh. 96:

1. Unconstitutionally burdened those minors in whose best interest it is that their parents not be notified of their decision to terminate their pregnancies. *Baird* v. *Bellotti*, 450 F. Supp. 997, 1000 (1978) (*Baird* III)

2. Violated the due process and equal protection rights of mature minors who are capable of giving informed consent to abortion procedures by permitting a judicial override or veto of their consent. *Id.* at 1003.

3. Created an "impermissible chill" by use of overly broad language which could not be remedied by a limiting judicial construction. *Id.* at 1004.

Further support for the rationale of *Baird* III was recently given by the United States Court of Appeals for the Seventh Circuit in *Wynn* v. *Carey,* No. 78-1262 (7th Cir. August 17, 1978). That Court found unconstitutional an Illinois parental consent statute patterned after the Massachusetts statute in question in this appeal. The *Wynn* Court relied heavily on the reasoning in *Baird* III and drew similar conclusions.

The District Court's opinion was founded on evidence presented by the parties at two separate and complete trials. The Attorney General has argued in his jurisdictional statement that the District Court did not base its decision on an adequate factual record for reason that the District Court, after hearing, denied the defendants' motion for leave to conduct a health care survey among members of plaintiffs' physician class. The District Court acted well within its discretion in denying defendants' motion. The motion was untimely in that discovery for the *Baird* III trial was commenced by the defendants in February, 1977 and defendants failed to file their motion until August, 1977. The survey contemplated by the defendants was complex and its completion would have obviously required a continuation of the trial date. The survey itself was also of doubtful import to the issues to be tried. The issue before the District Court, was not whether some private health care providers discriminated or burdened minors, rather it was whether or not the Commonwealth by means of the statute had done so.

The defendants also question the scope of the remedy employed by the District Court. The District Court discussed at great length the ability of courts to rewrite statutes and decided that such a remedy would be inappropriate given the interpretation of the statute in *Baird* v. *Attorney General, supra,* and the failure of the legislature

to alter the unconstitutional aspects of the statute during a recent reenactment. The Court noted that:

> Whatever may have been the legislature's original intent, we observe that it reenacted the statute, without amendment, in 1977 Mass. Acts. ch. 397, not only after the Supreme Court had indicated what might pass constitutional muster, but after the Massachusetts court had disclosed this apparent overbreadth, and we had commented, in *Baird* III, on its chilling effect. The statute is a prominent public issue, and we cannot think the legislature was unaware of its judicial course. Under these circumstances it may be thought that the legislature prefers the chilling effect rather than to have the statute expressed in 'terms that the ordinary person exercising ordinary common sense can sufficiently understand.' " *Baird* III

The District Court quite properly left to the legislature the task of reformulating the statute.

Conclusion

This Court should affirm the final judgment and order of the District Court without further review.

Respectfully submitted,

JOSEPH J. BALLIRO
JOAN C. SCHMIDT
Attorneys for Appellees

Supreme Court, U. S.
FILED
SEP 27 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

Nos. 78-329, 78-330.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL
OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,

JANE HUNERWADEL,
APPELLANT,
v.
WILLIAM BAIRD, ET AL.,
APPELLEES,

PLANNED PARENTHOOD LEAGUE
OF MASSACHUSETTS,
CRITTENTON HASTINGS HOUSE & CLINIC
AND PHILLIP G. STUBBLEFIELD, M.D.
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Motion to Affirm of Appellees Planned Parenthood League of Massachusetts, Crittenton Hastings House & Clinic and Phillip G. Stubblefield, M.D.

JOHN H. HENN,
SCOTT C. MORIEARTY,
SANDRA L. LYNCH,
FOLEY, HOAG & ELIOT,
10 Post Office Square,
Boston, Massachusetts 02109.
(617) 482-1390
Attorneys for Appellees Planned Parenthood League of Massachusetts, et al.,

Of Counsel:
JOHN REINSTEIN,
Civil Liberties Union
of Massachusetts,
68 Devonshire Street,
Boston, Massachusetts 02109.
(617) 742-8020

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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In the
SUPREME COURT OF THE UNITED STATES.

October Term, 1978.

Nos. 78-329
78-330

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, et al.,

Appellants,

JANE HUNERWADEL,

Appellant.

v.

WILLIAM BAIRD, et al.,

Appellees,

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, CRITTENTON HASTINGS HOUSE & CLINIC and PHILLIP G. STUBBLEFIELD, M.D.

Appellees.

On Appeal From the
United States District Court
For the District of Massachusetts.

MOTION TO AFFIRM OF APPELLEES PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, CRITTENTON HASTINGS HOUSE & CLINIC and PHILLIP G. STUBBLEFIELD, M.D.

Planned Parenthood League of Massachusetts, the Crittenton Hastings House & Clinic, and Phillip G. Stubblefield, M.D., appellees in the above-entitled case, move, pursuant to Rule 16 of the Rules of the Supreme Court, that the final judgment and order of the United States District Court for the District of Massachusetts be affirmed on the ground that the questions presented by the appeals are so unsubstantial as not to warrant further argument.

Statement of the Case and Proceedings Below

Two pregnant teenage women, their physician and the director of a family planning clinic brought this class action in the district court challenging the constitutionality of the Massachusetts statute restricting the rights of minors to obtain abortions. The challenged statute, M.G.L. c. 112 §12S[1/], provides that a

1/ A 1977 Massachusetts enactment, St. 1977, ch. 397, altered the numbering of paragraphs in the abortion statute, so that §12P, which was the section number originally before the district (footnote continued)

pregnant minor may not terminate her pregnancy unless she has the consent of both of her parents or she obtains the consent of a Massachusetts superior court judge. The Attorney General of the Commonwealth and others were named as defendants and Jane Hunerwadel, a parent, was allowed to intervene as defendant. In 1978, the district court permitted post-judgment intervention on plaintiffs' side by appellees here, Planned Parenthood League of Massachusetts and Crittenton Hastings House & Clinic, organizations which provide counseling to pregnant adolescents, and Phillip G. Stubblefield, M.D.[2/]

The case was first tried in 1975. After hearing several days of testimony, the three-judge district court, with a dissenting opinion, found M.G.L. c. 112 §12S to be unconstitutional and permanently enjoined its enforcement. Baird

(footnote 1 continued)

court, became §12S. The statute, entitled "An Act to Protect Unborn Children And Maternal Health Within Present Constitutional Limits", is set forth at pp. 4-5 of appellant Attorney General's Jurisdictional Statement.

2/ Prior to their intervention, these parties had been accorded a special stature beyond amicus status. Baird v. Bellotti, 450 F.Supp. 997, 999 n. 3, 1001 n. 6 (D.Mass. 1978).

v. Bellotti, 393 F. Supp. 847 (D. Mass. 1975) (Baird I).

The appellant Attorney General had represented to the district court his view of the meaning of several provisions of the statute. 393 F. Supp. at 855. On appeal to this Court, the Attorney General altered his statements as to the meaning of these provisions and argued that ambiguity in their meaning permitted a construction of the statute which might obviate or modify the constitutional question presented. Relying upon those representations, this Court vacated the decision below, ordered abstention, and directed the district court to certify questions about the meaning of §12S to the Supreme Judicial Court of Massachusetts. Bellotti v. Baird, 428 U. S. 132 (1976) (Bellotti). The district court certified a series of nine questions to the Supreme Judicial Court, which heard arguments and received briefs from the parties here, including the appellant Attorney General.

The decision of the Supreme Judicial Court, Baird v. Attorney General, Mass. Adv. Sh. (1977) 96, 360 N. E. 2d 288 (1977) (Attorney General), rejected many of the

Attorney General's proffered interpretations of the statute. The appellant Attorney General had asserted to this Court and to the Supreme Judicial Court: 1) that because of the Massachusetts "mature minor" rule, a minor who was "determined by a court to be capable of giving informed consent [to an abortion] will be allowed to do so [without judicial override of her decision]", 428 U.S. at 144; 2) that "a mature minor capable of giving informed consent [may] obtain ... an order permitting the abortion without parental consultation", id at 145; and 3) that "even a minor incapable of giving informed consent [may] obtain an order without parental consultation where there is a showing that the abortion would be in her best interests", id. The Supreme Judicial Court rejected each of these interpretations.

That court held that the statute requires all minors (unless married, widowed or divorced) to obtain the written consent of both parents to an abortion, and should either parent not consent, to obtain the consent of a superior court judge based

on his view of her best interests. Specifically, the Supreme Judicial Court held that the statute mandates parental consultation in all cases, including cases where a mature minor has given an informed consent and cases where the superior court judge would find that parental consultation is contrary to the best interests of the minor. 360 N.E. 2d at 296-297.

The Supreme Judicial Court further held that the issue before the superior court judge is not whether the minor is capable of giving an informed consent, but whether, in the judge's view, an abortion is in the best interests of the minor. Id. at 293. The superior court judge, thus, has the power to override the informed consent of a mature minor. The Supreme Judicial Court held that the burden is on the pregnant minor to commence the judicial proceeding and obtain consent of the superior court judge, and that the parents must be named as defendants and given notice of the superior court proceedings and an opportunity to contest. Id. at 297, 298.

In its opinion the Supreme Judicial Court also added an uniquely elastic final

interpretation of the statute. The court said that if any of its interpretations of the statute did not meet constitutional standards, then it meant to interpret the statute in any way which did meet those standards:

> "If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation." 360 N.E. 2d at 292.

With such guidance as to the precise meaning of the statute, the case was returned to the federal district court. The statute was stayed, Baird v. Bellotti, 428 F. Supp. 854 (D. Mass. 1977) (Baird II), and extensive discovery followed.

After evidentiary hearings, the district court held the statute, G.L. c. 112 §12S, to be unconstitutional, one judge dissenting in part, Baird v. Bellotti, 450 F. Supp. 997 (D. Mass. 1978) (Baird III). That decision is the basis for the instant appeals.

In the opinion by Senior Circuit Judge Bailey Aldrich, the district court found the statute to be unconstitutional because 1) its absolute requirement of parental consultation placed an improper burden on the minor's right to abortion where the superior court would, if free to do so, find that the minor's best interests require that one or both of her parents not be informed; and 2) its rejection of the mature minor rule as to abortions placed "an undue burden [on the minor] in the due process sense" and constituted "a discriminatory denial of equal protection". Baird III at 1004. The court also found that, as a practical matter, the broad language of the statute would chill the rights of minors by suggesting to parents that they were free to include considerations, such as their own interests, other than the consideration of the minor's best interests in deciding whether they would consent to an abortion. Finally, the court declined to rewrite the statute to meet constitutional requirements.

Argument

This Court, in its discretion, should not give plenary consideration to the issues raised by these appeals but should simply affirm the decision below. Maloney v. Lady Jane, 431 U.S. 926 (1977), affirming Lady Jane v. Maher, 420 F. Supp. 318 (D.Conn. 1976). In moving for summary affirmance, appellees do not denigrate the important potential benefit of parental consultation with a pregnant minor about her decision whether to carry her pregnancy to term. Appellees recognize, as did the district court, that such consultation is, as a general matter, both wise and desirable. Nor do appellees wish to suggest that the issue of such beneficial parental involvement is unsubstantial. That issue is not, however, the issue raised by this appeal. The much narrower issues involved here instead do not warrant further consideration and have already been resolved by this Court in prior decisions.

I. THE DECISION BELOW IS WHOLLY CONSISTENT WITH THIS COURT'S PRIOR DECISIONS IN DANFORTH AND BELLOTTI AND RAISES NO NEW ISSUES WARRANTING PLENARY CONSIDERATION BY THIS COURT.

In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), this Court invalidated a Missouri statute which imposed spousal and, in the case of unmarried minors, parental consent requirements on the right of a female and her doctor to decide whether to terminate her pregnancy.[3/] This Court struck down both requirements, holding that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy..." Id. at 74.

On the same day Danforth was decided, this Court, in vacating the decision in Baird I, commented that a statute which

> "permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interest"

would be "fundamentally different" from a statute that creates a "parental veto". Bellotti at 145.

It is now apparent that the Massachusetts consent statute, as construed by the Supreme Judicial Court, suffers the same infirmity as the spousal and parental consent provisions of the Missouri statute -- that is, it permits a "third party" veto of a mature minor's informed decision to terminate her pregnancy. It is equally evident that the statute lacks the saving provisions which this Court hypothesized might distinguish the Massachusetts enactment from that struck down in Danforth.

A. The Massachusetts Statute Assigns to the State Court An Impermissible Third Party Veto.

The Massachusetts statute as construed by the Massachusetts Supreme Judicial Court

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3/ The Missouri statute, unlike the Massachusetts statute, required the consent of only one parent. Id. at 72.

requires a minor wishing an abortion, who fails to obtain the consent of both parents,[4/] to apply to a judge of the superior court for an order permitting the abortion over either parent's objection. However, the judge is to be guided by his own assessment as to whether the minor's "best interests" justify the abortion, and may "veto" an informed and reasonable decision of a mature minor to terminate her pregnancy. The Supreme Judicial Court stated:

> "...we do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion... [I]n circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail..." 360 N.E. 2d at 293.

Such a third party "veto", whether "of a parent or person in loco parentis", is precisely what was forbidden in Danforth.

4/ Even a mature, informed minor who has no parents or available parent substitutes apparently cannot obtain an abortion on her own consent, but must obtain consent from a superior court judge. 360 N.E. 2d at 294, 297, 301.

Id. at 75. All three members of the district court agreed that the Massachusetts statute, as construed, creates such an unconstitutional third-party veto. The unconstitutionality of the statute in this respect[5/] is patent and does not present an issue worthy of further argument before this Court.[6/] See Lady Jane v. Maher, 420 F.Supp. 38 (D. Conn. 1976) (three judge court), aff'd sub nom, Maloney v. Lady Jane, 431 U.S. 926 (1977) (regulation requiring minors in the care of the Commissioner of Children and Youth Services to obtain Commissioner's consent before undergoing abortion is invalid).

5/ The district court was, of course, equally correct in holding with respect to the mature minor capable of giving informed consent that the Massachusetts statute also worked "a discriminatory denial of equal protection". Accord, Wynn v. Carey, No. 78-1262 (7th Cir. August 17, 1978)(invalidating similar parental/judicial consent statute).

6/ Nor can the statute's reliance on a flat rule of chronological age before it will defer to the female's abortion decision be justified by an interest in administrative convenience. The statute provides a mechanism -- the superior court -- which is well suited to determine individual differences in minors' abilities to consent and in the advisability of parental consultation, but then forbids use of this mechanism to recognize such differences.

B. The Massachusetts Statute Impermissibly Requires Parental Consultation in All Cases, Even Those Cases Where Such Consultation is Judicially Determined to Be Against the Minor's "Best Interests."

Appellants argued to this Court in their appeal of Baird I that the Massachusetts statute need not be construed to mandate parental consultation in all cases but rather permitted the parents to be "bypassed" if the minor's best interests so dictated. As previously noted, these representations lead this Court to remand with the observation that a statute which "prefers parental consultation and consent, but that permits ... an order permitting the abortion without parental consultation..." would differ "fundamentally" from the "parental veto" statute at issue in Danforth. Bellotti at 145. Mr. Justice Stewart, concurring in Danforth and citing Bellotti, also noted that a "materially different constitutional issue" would be framed were the statute construed to require parental consultation and consent "in most cases" while recognizing that in some cases "the minor is mature enough

to give an informed consent without parental concurrence..." Danforth at 91.

However, as construed by the Supreme Judicial Court, the Massachusetts statute does not merely "prefer" parental consultation "in most cases", but mandates that in all cases reaching the superior court both parents must be informed and invited to oppose in court the minor's request for an abortion.[7/] The notice requirement obtains not only without regard to whether the minor is mature and capable of giving an informed consent, but also without regard to whether the minor's best interests would be served if her parents were not informed or consulted.[8/]

7/ Requiring the minor to name her parents as defendants in the superior court is also, as the district court found, destructive of the family relationship and places a heavy burden on the minor. Whatever the outcome of the court hearing, the minor "is in a no-win situation." Baird III at 1001-1002.

8/ In both Danforth and Bellotti, this Court recognized that in some instances it is in the minor's best interest, be she mature or not, that her parents not be consulted about the abortion decision. The defendants below admitted and the district court found that "an appreciable number

(footnote continued)

This Court has never suggested that a state may mandate parental consultation even where the minor is ill-served by notifying her parents, and the question whether a state may do so does not pose an issue worthy of further argument.

C. The Court Below Made No Decision Concerning the Validity of a Statute Which Encourages and Prefers Parental Consultation and Consent But Which Permits Certain Minors to Forgo Such Consultation and Consent With Court Approval.

It should be emphasized that the court below did not reach the question whether a statute which encourages and prefers parental consultation and consent but which provides an avenue for judicial approval of the minor's decision without parental consultation in some instances would be valid under the Due Process Clause. The court expressly declined to pass on

(footnote 8 continued)

of parents are not supportive," and that some parents would even inflict physical harm on the minor, or insist on an undesired marriage. Baird III at 1001. In Baird I, at 854, the district court also noted that some parents would "insist upon the continuance of the pregnancy simply as a punishment, or to teach a lesson."

appellees' assertion that any procedure which required a minor to sue her parents and obtain judicial approval of her abortion decision would entail impermissible burdens for the minor.[9/]

In short, the decision below simply rests on holdings that Massachusetts may neither mandate parental consultation in all cases nor vest in a superior court judge discretion to "veto" or "override" the decision of a mature, informed minor and her physician to terminate her pregnancy. These holdings are firmly grounded in this Court's Danforth decision and present no new issue worthy of plenary consideration.

9/ Although the court declined to reach this issue, appellees produced expert testimony, which the court found credible, that many minors would rather resort to illegal and frequently dangerous abortions than institute court proceedings against their parents. Baird III at 1001-1002.

II. THE SCOPE OF THE REMEDY ORDERED BY THE DISTRICT COURT WAS PROPER AND DOES NOT WARRANT FURTHER REVIEW.

A. It Would Have Been Error For The District Court To Use An "As Applied" Analysis As Urged By Appellant Attorney General.

Ignoring the decisions of this Court on the subject of abortion, appellant Attorney General argues that the district court should have resolved this case by using an "as applied" constitutional analysis. See said appellant's Jurisdictional Statement, pp. 17-19. At no time has this Court examined statutes in abortion cases under an "as applied" analysis. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973), Danforth; supra; Maher v. Roe, 432 U.S. 464 (1977). Nor would such an analysis by the district court have been appropriate.

The named parties in this case represent the classes of all minors and physicians in the Commonwealth and challenged the statute as being unconstitutional with respect to these classes. The challenge was procedurally identical to the successful class action challenge to the spousal and parental consent requirements in Danforth.

Appellant's claim that some form of "as applied" analysis was required is specious because its logic would require every individual minor desiring an abortion over the objection of either parent to go to court and demonstrate that the statute is unconstitutional as applied to her. The claim is also meaningless because the remedy will apply to the classes of all minors and physicians. At best, these assertions by appellant resolve into a complaint that the district court should have rewritten the statute so as to save it. See appellant Attorney General's Jurisdictional Statement, Part IV.

To the extent that appellants attack the district court's insistence that the state legislature draft an enactment narrowly tailored to meet legitimate state concerns, their argument flies in the face of this Court's repeated pronouncements that statutes in this area must be "narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155 (1973). See also Carey v. Population Services Internat'l, 431 U.S. 678, 686 (1977) ("where a decision as fundamental as whether to bear or beget a child is involved, regula-

tions imposing a burden on it ... must be narrowly drawn to express only those interests"). See also Maher v. Roe, supra at 145.

B. The Remedy Ordered Was Appropriate.

Under the circumstances of this case, it is extraordinary that appellant Attorney General seriously argues that this Court should reverse the district court for failing to rewrite this statute. At least three different meanings of the statute have been presented by this appellant. The Attorney General's mistaken conjectures as to the meaning of the statute have already occasioned a remarkable number of judicial hearings and opinions. This Court previously ordered abstention in this case so that the Supreme Judicial Court could interpret the meaning of the statute. Appellants now ask that this interpretation be disregarded and that some new "savings" construction be adopted.

The district court was, under this Court's repeated rulings, bound by the construction of state law given by the state's highest court. Mullaney v. Wilbur, 421 U.S. 684, 691 (1975); Winters v. New York, 333 U.S. 507 (1948); Murdock v. City of Memphis, 20 Wall. 590 (1875).

"In dealing with state laws, the [federal] Court cannot simply substitute a saving reinterpretation of a statute for that authoritatively given the statute by the state's highest court." Tribe, American Constitutional Law 717 (1978). Such an action by a federal court would violate basic principles of federalism.

Further, appellants' arguments that the court below was required to reconstruct the statute improperly thrusts upon the federal judiciary a state legislative function. Appellants in effect ask the federal courts "to make a new law, not to enforce an old one," a duty long eschewed by this Court. United States v. Reese, 92 U.S. 214, 221 (1876).[10/]

Similarly, the district court was also plainly correct in declining to accept the "invitation" (as appellant calls it) of the Supreme Judicial Court to find that the statute means whatever the Con-

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10/ The assumption of such a legislative function would be particularly inappropriate here where the Massachusetts legislature gave clear expression of its intention to adopt the statutory interpretation offered in the 1976 Supreme Judicial Court opinion by reenacting the statute in 1977 without changing its substantive content.

stitution requires. To have done otherwise would have been to exercise legislative functions which Article III does not grant to the federal courts. Under the Supreme Judicial Court's elastic interpretation, there would be a statute with no fixed content which the federal courts are to redraft according to whatever the Constitution requires. This would be analogous to giving advisory opinions on the meaning of the Constitution, which the federal courts, unlike the Supreme Judicial Court, may not do.

The Supreme Judicial Court's open-ended construction of the statute left the district court little choice as to the remedy it ordered. As the district court said:

> "It is commonly said that a statute is to be given a constitutional construction 'if fairly possible ... when a limiting construction ... could be placed.' Here something more is involved than construing language. The Massachusetts court, in addition to contradicting its specific terms, suggests reading into the statute affirmative provisions made out of nothing but a generally announced purpose to pass constitutional muster. In so doing, the court seems to have found the ultimate remedy for all constitutional

infirmities. If a statute which, in terms, requires parental consultation without exception, can be 'construed to require as much parental consultation as is permissible constitutionally,' here, at once, is an instant cure, both for overbreadth, and for lack of standards. Regardless of whether a statute says too much, or too little, so long as the legislature intended it to be constitutional, when it comes before a court it will be appropriately rewritten. With due respect, we cannot believe this to be possible." Baird III at 1005-06.

The Massachusetts legislature enacted a statute which paid no deference to its obligation to draft such statutes with reasonable clarity and narrowness, and the statute was properly voided.[11/] See Part IIA, supra.

11/ Appellant Attorney General's attempt to impute to the district court rulings as to the second and third trimester, see Jurisdictional Statement, p. 7, is a misstatement of the district court's decision. In the passage cited, Baird III at 1001, the district court was commenting on the misleading nature of a diagram that appellant had submitted to the court. It should be also noted that the minor consent statute itself makes no distinction between the first trimester and the later trimesters, although this distinction is made in the statutes defining the circumstances under which abortions are legal. Compare M.G.L. c. 112 §12L with c. 112 §12M. Just as this Court did not see fit in Roe v. Wade to "save" so much of that statute as might be applied to third trimester abortions, so too the district court here was not obligated to rewrite the Massachusetts stature.

C. The District Court Order Leaves Intact The Common Law Minor Consent Requirements.

The order of the District Court enjoining M.G.L. c. 112 §12S does not, contrary to the impression left by appellants[12/], void all parental consent requirements for minors to obtain abortions. Appellants would have this Court overlook the Massachusetts common law rule that an immature minor needs the consent of one parent to undergo medical or surgical procedures. Attorney General, supra, 360 N.E. 2d at 292-293, 296. The district court found, in Baird I at 852, that there was nothing which required an immature minor's consent for abortion purposes to be treated differently from other medical and surgical procedures, and that those procedures required the consent of one parent.

12/ See appellant Attorney General's Jurisdictional Statement, pp. 21-22: "... physicians and other health care providers in Massachusetts are now entirely free, at least as a matter of civil and criminal statutory law, to perform abortions upon adolescents and children without parental consent ...."

III. APPELLANT ATTORNEY GENERAL'S FURTHER GROUNDS FOR REVIEW DO NOT PRESENT SUBSTANTIAL QUESTIONS.

A. The District Court's Refusal to Authorize A Survey of Health Care Providers Does Not Raise an Issue Worthy of Further Consideration.

Appellant Attorney General complains that during discovery the district court denied his motion for leave to survey the class of health care providers in Massachusetts about their consent requirements for different medical procedures, age groups, and social situations. This complaint is then bootstrapped into an assertion that the district court's findings were based on an inadequate factual record.[13/] Appellant makes no showing, and indeed no claim, that the district court's factual findings are clearly

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13/ Appellant's claim that there was an inadequate record before the district court is insubstantial. After allowing considerable discovery, the district court held two additional days of trial (after three previous days in Baird I), heard witnesses and expert witnesses from both sides, and had before it extensive admissions by the parties. The testimony of certain experts covered immature minors and was not limited to particular stages of pregnancy. There was a more than adequate record for the court's findings.

erroneous, see Fed. R. Civ. P. 52, or that the court abused its discretion.

Insofar as appellant sought to conduct a survey of a portion of the plaintiff class (health care providers), it was well within the discretion of the district court to deny permission. It is settled that contact of absentee class members rests in the court's discretion. Weight Watchers of Phila. v. Weight Watchers Int'l, 455 F.2d 770, 775 (2d Cir. 1972). Similarly, even had a survey been conducted, its admissibility at trial is committed to the discretion of the trial court, and such evidence has often been criticized for its unreliability. Colorificio Italiano Max Meyer, S.P.A. v. S/S Hellenic Wave, 419 F.2d 223 (5th Cir. 1969); Sears, Roebuck & Co. v. All States Life Ins. Co., 246 F.2d 161, 171-72 (5th Cir. 1957), cert. denied 355 U.S. 894 (1957); Bristol Myers v. Federal Trade Commission, 185 F.2d 58 (4th Cir. 1950). See Fed. R. Evid. 403. A survey of different consent practices would also be of dubious relevance because the matter of consent to medical procedures for minors is explicitly covered by both statute, M.G.L. c. 112 §12F, and common law. See Attorney General at 296.

B. The District Court's Award of Costs Does Not Raise An Issue Worthy of Further Consideration.

The award of costs was also proper on the record here and does not, in any case, raise a substantial question. Appellant Attorney General has, Jurisdictional Statement p. 23, misstated the action of the district court. The court's short hand term "mistaken advocacy," which was the basis for the award, plainly refers to appellant's frequently changing, frequently inconsistent, and frequently mistaken representations as to the meaning of the statute. These changes are described in Baird II and extended this litigation through lengthy proceedings in several courts. The burden on appellees to secure their rights was commensurately increased and the award of costs is proper.

That costs may be awarded to a successful litigant is hardly extraordinary, nor does the fact that costs here are assessed against the Attorney General pose any substantial issue. See Hutto v. Finney, 46 U.S.L.W. 4817 (1978) and cases cited therein.

Conclusion

For the foregoing reasons, the motion to affirm of Planned Parenthood League of Massachusetts, et al., should be granted.

Respectfully submitted,

JOHN H. HENN
SCOTT C. MORIEARTY
SANDRA L. LYNCH
Foley, Hoag & Eliot
10 Post Office Square
Boston, MA 02109
(617) 482-1390
Attorneys for Appellees
Planned Parenthood
League of Massachusetts,
et al.

Of Counsel:
JOHN REINSTEIN
Civil Liberties Union
of Massachusetts
68 Devonshire Street
Boston, MA 02109
(617) 742-8020

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In the
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OCTOBER TERM, 1978

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APPELLANTS

v.

WILLIAM BAIRD, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Brief for the Appellants

FRANCIS X. BELLOTTI
Attorney General
GARRICK F. COLE
MICHAEL B. MEYER
THOMAS R. KILEY
Assistant Attorneys General
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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Brief for the Appellants

Opinions Below

This case is before the Court for the second time. The District Court's original decision holding the statute unconstitutional was filed on April 28, 1975, and is reported at 393 F. Supp. 847 (D. Mass. 1975) (1 App. 499). This Court, in an opinion dated July 1, 1976, and reported at 428 U.S. 132, vacated the District Court's judgment on abstention grounds and

remanded for further proceedings, including certification of certain questions to the Massachusetts Supreme Judicial Court. The District Court certified nine questions to the Supreme Judicial Court on August 31, 1976, and the Supreme Judicial Court answered these questions in an opinion dated January 25, 1977. The Supreme Judicial Court's opinion appears in the official advance sheets at Mass. Adv. Sh. (1977) 96 and is published in the Northeastern Reporter at 360 N.E. 2d 288 (Mass. 1977) (1 App. 531). On February 10, 1977, the District Court issued its opinion and order granting a preliminary injunction against appellants, and this opinion is reported at 428 F. Supp. 854 (D. Mass. 1977) (1 App. 610). After trial in the fall of 1977, the District Court issued its opinion and entered a final order permanently enjoining appellants from enforcing the statute. This opinion, dated May 2, 1978, is reported at 450 F. Supp. 997 (D. Mass.) and, pursuant to this Court's rules, was reprinted in the appendix to the jurisdictional statement filed on August 25, 1978, and is also reproduced at 1 App. 640.[1]

Jurisdiction

The Attorney General and the District Attorneys of the Commonwealth's ten (now eleven) administrative districts appeal from a final order of a three-judge panel of the United States District Court for the District of Massachusetts. A single district judge convened the three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 (1970) because plaintiffs-appellees' complaint sought permanent injunctive relief under

[1] On June 20, 1978, the District Court issued an amended final order correcting a typographical error in its order of May 2, 1978. Both of these orders were also reproduced in the appendix to the jurisdictional statement.

42 U.S.C. § 1983 (1970) against the Attorney General and the District Attorneys, the state officials charged with enforcement of the statute's provisions.[2]

In summary, plaintiffs' complaint in the District Court claimed that the statute violates the due process and equal protection clauses of the Fourteenth Amendment by requiring a physician to obtain the consent of a pregnant minor's parents before performing an abortion, thus, according to plaintiffs, imposing a burdensome and discriminatory requirement. Upon remand and after receiving responses to its certified questions from the Massachusetts Supreme Judicial Court, the District Court handed down its decision and entered an order on May 2, 1978, permanently enjoining appellants from enforcing the statute. Appellants filed their notice of appeal in the District Court on June 26, 1978 (previously reproduced in the appendix to the jurisdictional statement), and their jurisdictional statement on August 25, 1978. This Court has jurisdiction of this appeal under 28 U.S.C. § 1253 (1970) and noted probable jurisdiction on October 30, 1978. 47 U.S.L.W. 3292-93 (October 31, 1978).

Statute Involved

The District Court determined that Massachusetts General Laws ch. 112, § 12S, as inserted by St. 1974, ch. 706, § 1, and renumbered by St. 1977, ch. 397, was unconstitutional. This statute differs significantly only in its codification identification from the statute which was before this Court in *Bellotti* v.

[2] 28 U.S.C. § 2281 (1970) was repealed by 90 Stat. 1119. However, the repeal effected by this statute did not affect actions commenced on or before its date of enactment. 90 Stat. 1119, § 7.

Baird, supra.[3] The statute appears in the General Laws in the following form:

> § 12S. If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died, or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who has assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.
>
> Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent for the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve U.

[3] The citation to the statute considered in *Bellotti* was G.L. ch. 112, § 12P. St. 1977, ch. 397, repealed § 12P and inserted § 12S in its place. Minor alterations in paragraphing and corrective reference changes without relevance to present purposes were also made.

Questions Presented

1. Whether G.L. ch. 112, § 12S, as inserted by St. 1974, ch. 706, § 1, and renumbered by St. 1977, ch. 397, violates the constitutional rights of certain minors (e.g., those capable of giving "informed consent" to abortion surgery, those for whom parental consultation would not be in their best interests, and those incapable of giving "informed consent") under the Fourteenth Amendment to the Constitution of the United States by prohibiting physicians from performing abortion surgery upon such minors without first obtaining parental consent or judicial authorization and is therefore invalid on its face.

2. Whether the District Court erred in refusing defendants-appellants permission to conduct a survey of health care provider consent practices in Massachusetts.

3. Whether the District Court correctly determined that plaintiffs-appellees might properly challenge G.L. ch. 112, § 12S, on its face rather than as applied to certain minors (e.g., those capable of giving "informed consent" to abortion surgery and those for whom parental consultation would not be in their best interests).

4. Whether the District Court properly refused to enter an injunction carefully drawn to prohibit defendants-appellants from enforcing G.L. ch. 112, § 12S, only in those instances in which it had determined that enforcement would violate the constitutional rights of certain minors (e.g., those capable of giving "informed consent" to abortion surgery and those for whom parental consultation would not be in their best interests).

5. Whether the District Court may order the defendants to pay plaintiffs' litigation costs incurred in this Court and the District Court "lost because of defendants' mistaken advocacy."

Statement of the Case and Summary of Prior Proceedings

Prior Proceedings

Plaintiffs-appellees commenced this civil rights action under 42 U.S.C. § 1983 (1970) in December, 1974. The original plaintiffs were William Baird, four female adolescents who sued under pseudonyms, Parents' Aid Society, Inc., and Gerald Zupnick. The original defendants were the Attorney General of the Commonwealth and the District Attorneys of the ten (now eleven) administrative districts of the Commonwealth. The gravamen of the original complaint was that G.L. ch. 112, § 12P, as inserted by St. 1974, ch. 706, and now renumbered by St. 1977, ch. 397 (the statute), violated the Fourteenth Amendment's due process and equal protection clauses because the statute required unmarried pregnant minors to obtain either parental consent or judicial approval for an abortion. Complaint, ¶¶ IV, VII. The District Court permitted certain parents to intervene as defendants and dismissed three of the adolescent plaintiffs and all of the intervening parents save Jane Hunerwadel from the case for want of proof. *Baird* v. *Bellotti*, 393 F. Supp. 847, 849-50 (D. Mass. 1975) (*Baird I*). Plaintiffs moved that each named plaintiff be certified as representative of its respective class, and specifically moved that the named unmarried pregnant minor plaintiff be certified as "representative of the class of pregnant minors capable of and willing to give informed consent to an abortion." Motion to Certify Plaintiffs' Classes, ¶ 1. The District Court determined that plaintiffs Mary Moe I, Parents' Aid Society, Inc., and Gerald Zupnick were adequate representatives of the classes they sought to represent and certified the action "as a valid class action as to all." *Baird I* at 852.[4]

Plaintiffs brought their action as a "facial attack" on the statute and sought declaratory and injunctive relief. *Baird I* at 849. The District Court granted a temporary restraining order and preliminary injunctive relief and, after trial, issued an opinion and entered an order permanently enjoining the defendants from enforcing the statute. *Baird I* at 857. The District Court's decision was based upon a conclusion that the parental consent requirement violated the due process rights of unmarried pregnant minors. *Baird I* at 855-57.

Defendants appealed to this Court on May 16, 1975, and, in a decision dated July 1, 1976, this Court vacated the District Court's decision on abstention grounds and directed the certification of ambiguous state law questions to the Supreme Judicial Court. *Bellotti* v. *Baird*, 428 U.S. 132 (1976) (*Bellotti I*). Upon remand, the District Court certified a series of questions concerning the statute's requirements and standards to the Supreme Judicial Court. The parties filed briefs and offered oral argument before the Supreme Judicial Court in November, 1976, and, in an opinion dated January 26, 1977, the court answered the District Court's questions. *Baird* v. *Attorney General*, Mass. Adv. Sh. (1977) 96, 360 N.E. 2d 288 (Mass. 1977) (*Attorney General*). Proceedings and preparation for a new trial began in the District Court in early February, 1977.

Plaintiffs filed their first amended complaint on February 2, 1977. This amended complaint made slightly more explicit due process claims than the original complaint, omitted any reference to the statute's endorsement of "parental vetoes" in light of the Supreme Judicial Court's construction of it in *Attorney General*, asserted the statute's invalidity on overbreadth

[4] The District Court did not include Baird within its certification because of doubts about his standing. *Baird I* at 851. These doubts have never been resolved.

grounds, and additionally claimed a denial of equal protection resulting from the exceptions contained in G.L. ch. 112, § 12F, as inserted by St. 1970, ch. 847, and renumbered by St. 1977, ch. 335, § 1. After a hearing on plaintiffs' motion for a preliminary injunction, the District Court, one judge dissenting, issued an opinion and entered an interlocutory injunction on February 10, 1977, enjoining defendants' enforcement of the statute. *Baird* v. *Bellotti*, 428 F. Supp. 854 (D. Mass. 1977) (*Baird II*). Defendants commenced discovery on February 22, 1977, and the parties engaged in discovery for the next eight months. Planned Parenthood League of Massachusetts and others filed a motion to intervene as plaintiffs on April 1, 1977, and plaintiffs filed a motion for summary judgment on April 5, 1977. The District Court held an initial hearing on these matters on April 5, 1977, and set the motions to intervene and for summary judgment for further hearing on April 13, 1977. At this hearing, the court denied plaintiffs' motion for summary judgment and ordered the parties to meet to arrange a tentative schedule for discovery and trial. The District Court denied Planned Parenthood's motion to intervene on April 21, 1977.

On July 13, 1977, the District Court entered an order setting the case for pre-trial conference on August 22, 1977. A single judge held a hearing on August 2, 1977, during which he announced that the court had denied defendants' motion for leave to contact members of the plaintiff class, leave which defendants had sought in order to conduct a survey of the consent practices of Massachusetts health care providers. (The class for which defendants sought leave to contact included all physicians and all health care institutions providing abortions to minors in Massachusetts.) The District Court held a pretrial conference on August 22, 1977, considered various discovery matters, attempted to clarify the issues, and set the case

for trial on October 17, 1977. The case was tried on October 17 and 18, 1977.

The District Court, one judge again dissenting, handed down its decision and entered an order once again declaring the statute unconstitutional and enjoining defendants from enforcing it on May 2, 1978. Although the court's decision should be read in its entirety in order to apprehend the variety of conclusions it contains, it seems fair to summarize its determinations in broad terms as consisting of several related decisions, the chief of which amount to determinations that the statute imposes impermissible burdens upon and denies equal protection to some minors. In addition, the court concluded that, despite the Supreme Judicial Court's invitation, it would not undertake to carve the offensive portions of the statute as construed from its acceptable provisions but rather would enjoin all efforts to enforce any of its requirements. Finally, the District Court awarded plaintiffs their litigation costs in both the District Court and this Court "lost because of defendants' mistaken advocacy." *Baird* v. *Bellotti*, 450 F. Supp. 997, 1006 (D. Mass. 1978) (*Baird III*). On June 19, 1978, the District Court allowed Planned Parenthood's and various others' motion for post-judgment intervention as plaintiffs over the objection of all parties, and on June 20, 1978, the court entered an amended order correcting a typographical error in its May 2, 1978, order. Defendants and defendant-intervener filed their notices of appeal to this Court in the District Court on June 26, 1978. This Court noted probable jurisdiction on October 31, 1978. *Bellotti* v. *Baird*, U.S. , 47 U.S.L.W. 3292-93 (October 31, 1978).

Summary of Factual Evidence

The factual record in this case, as with most involving legislative facts,[5] contains a great variety of evidence admitted under various theories of materiality and possessing varying degrees of relevance. Given the parties' diverse framing of the issues and the existence of ambiguities central to the case which were never resolved through the discovery process or at trial,[6] it is difficult to summarize the facts comprehensively. In place of such an effort, this summary covers the most important evidence presented concerning the nine most important factual questions:

1. The distribution of unwanted pregnancies among minors;
2. The relative risk and psychological impact of abortion surgery upon minors as compared with other forms of medical and surgical procedures;
3. The psychological ambivalence and trauma associated with a minor's abortion decision;
4. The importance of parental guidance to a minor faced with the abortion decision;
5. The proportion of minors which physicians consider should or should not inform their parents of their pregnancy;
6. The psychological effect of court proceedings upon minors;
7. The age at which minors appear to physicians as able to give informed consent;

[5] The role of legislative facts in developing the record before the District Court is discussed in Argument Section II, below.

[6] The question whether the claims of immature minors were before the District Court is a good example of a critical ambiguity which had significant implications for discovery and the presentation of evidence at trial. Although this problem is discussed in several places in the Argument, its most thorough treatment appears in Section III.

8. The rate of recidivism, i.e., the occurrence of second or more unwanted pregnancies, among minors; and
9. The formal opinion of professional groups interested in the care of adolescents and children concerning the performance of abortion surgery upon minors with or without parental consent.

1. *The Distribution of Unwanted Pregnancies Among Adolescents and Children*

Plaintiff's principal expert witness, Dr. Carol Nadelson, a psychiatrist, provided the only testimonial evidence at the second trial concerning the incidence and distribution of unwanted pregnancies among adolescents and children. Dr. Nadelson testified that she had dealt with "one or two" 10-year-olds who were pregnant, 2 App. 515-16, and the medical literature, as compiled in excerpts in defendants' requests for admissions, reports term pregnancies in minors as young as five years of age. 1 App. 210-11. The rate of pregnancies in minors between ten and seventeen appears to be increasing, 1 App. 207-13, and minors as young as nine have sought birth control information from clinics. 1 App. 213. Approximately 1,000,000 young American women, aged fifteen to nineteen, become pregnant each year, of whom approximately 590,000 give birth, 270,000 have abortions, and 140,000 experience miscarriages. 1 App. 157-58. Approximately 30,000 American minors under age fifteen become pregnant each year, of whom approximately 13,500 have abortions, 12,600 give birth, and 3,900 experience miscarriages. 1 App. 158-59.

2. *The Relative Risk and Psychological Impact of Abortion Surgery Performed on Minors as Compared with Other Medical and Surgical Procedures*

Plaintiffs' expert Dr. Nadelson was the only expert to testify at the second trial concerning the relative risk and psychologi-

cal impact of abortion surgery performed on minors. 2 App. 306-08; 313-15. At the first trial, both plaintiffs and defendants presented testimony on this subject, and the District Court's findings appear in *Baird I* at 853 and *Baird III* at 1004. Findings reported in the medical literature appear as excerpts in defendants' requests for admissions, 1 App. 177-96; 221-23; 225-33; 248-50; 252-65; 270-71; 273-75.

3. *The Psychological Ambivalence and Trauma Associated with a Minor's Abortion Decision*

The discovery process produced evidence which established that adolescents and children facing the abortion decision experience psychological problems in addition to those which adults encounter and which are uniquely related to their immaturity. For example, the evidence demonstrated that an adolescent lacks experience with her feelings and does not have the emotional control of an adult, 1 App. 221-23; that ambivalence is prominent among adolescents, 1 App. 230-31; that a period of intense anxiety and ambivalence is often experienced in the twenty-four hours prior to an abortion, 1 App. 228-29; that a pregnant adolescent is essentially a child potentially bearing a child, 1 App. 232-33; and that a pregnant minor who makes the abortion decision in collaboration with her parents is usually best prepared for the surgery. 1 App. 248-50. Plaintiffs' expert Dr. Nadelson generally agreed with these propositions. 2 App. 489-644.

4. *The Importance of Parental Guidance to a Minor Faced with the Abortion Decision*

The evidence approaches unanimity on the importance of parental support and guidance to adolescents and children facing the abortion decision. The testimony of both plaintiffs' and defendants' experts at both the first and second trials, as

well as the products of discovery, demonstrated that supportive parental involvement, obtainable in the vast majority of cases, was beneficial to pregnant minors. See *Baird III* at 1006, n. 16 (Julian, J., dissenting); 1 App. 248-50; 2 App. 37-38; 54; 82; 103-04; 111; 136; 145; 184; 226; 249-50; 539-42.

5. *The Proportions of Minors which Physicians Consider Should and Should Not Inform their Parents of their Pregnancy*

Plaintiffs' expert, Dr. Nadelson, also provided the major portion of the evidence concerning the proportions of minors which physicians consider should and should not inform their parents of their pregnancy. Dr. Nadelson testified at trial that about 40 per cent of the patients she saw at her clinic did not want to inform their parents, but would be helped by having their parents involved in the counselling process. 2 App. 343-45. At deposition, Dr. Nadelson testified that, for approximately 5 per cent of her private practice patients and approximately 10 per cent of her clinic patients, consultation with parents was "objectively contraindicated." 2 App. 541-42. By "objectively contraindicated" Dr. Nadelson meant that she, as a psychiatrist, would agree with the adolescent's view that her parents should not be informed of her pregnancy. 2 App. 338. In other words, for Dr. Nadelson's clinic patients, approximately 50 per cent wished to tell their parents, approximately 40 per cent did not wish to tell their parents but would be helped by parental involvement (i.e., parental consultation was "subjectively contraindicated" but "objectively indicated"), and approximately 10 per cent did not wish to tell their parents and would be hurt by parental involvement (i.e., parental consultation was both "subjectively contraindicated" and "objectively contraindicated"). Another of plaintiffs' experts testified that parental involvement was extremely impor-

tant although rare cases exist in which it is impossible to obtain. 2 App. 37-38. In the great majority of cases, a minor's fears that her parents would not be helpful were groundless, and, if the parents were not involved in the making of the abortion decision because of these fears, the adolescent or child would be deprived of the great benefit which parental support, everyone agreed, provides. 2 App. 104-05; 139. For a summary of this evidence, see *Baird III* at 1012 (Julian, J., dissenting).

6. *The Psychological Effect of Court Proceedings upon Minors*

Expert evidence was also introduced, necessarily based upon hypothetical circumstances, concerning the effect which involvement in court proceedings might have upon pregnant minors. Plaintiffs' expert witness, Dr. Nadelson, testified that having to go to court in the face of parental opposition to her desire to obtain an abortion would have a "severely detrimental" effect on an adolescent or child who was in basic disagreement with her parents. 2 App. 296. Dr. Nadelson also testified that some adolescents in this situation would obtain illegal or out-of-state abortions rather than obtain parental consent or judicial approval, but that accurate data quantifying the proportion of adolescents which would turn to these alternatives do not exist. 2 App. 299-301. Defendants' expert, Dr. Sprague Hazard, a pediatrician with a special interest in the care of adolescents, testified that, in those situations where a minor's parents were unalterably opposed to an abortion, a court proceeding "might" cause severe psychological trauma. 2 App. 422.

7. *The Age at which Minors Appear to Physicians as Able to Give Informed Consent*

The concept of informed consent and the ability of adolescents and children, from a physician's point of view, to assent

intelligently to the performance of abortion surgery elicited a variety of expert opinions. While the experts agreed that the percentage of minors able to give informed consent increased with age, they disagreed over the specific percentages. The District Court aptly summarized the evidence at the first trial on this subject as follows:

> Plaintiffs' experts were of the view that a majority of 16 and 17 year olds are capable [of giving informed consent]. Defendants' experts, although they felt that essentially all are capable at 18, considered the 18th birthday a significant turning point, and would concede only a substantial minority at age 17. *Baird I* at 854.

The discovery process and the second trial did not improve upon this disparity in views.

8. *The Rate of Recidivism, i.e., the Occurrence of Second or More Unwanted Pregnancies, Among Minors*

Plaintiffs' expert Dr. Nadelson also provided the main evidence on the rate of recidivism, or the occurrence of second or more unwanted pregnancies, among minors. Dr. Nadelson testified that the literature reported recidivism rates of from 15 per cent to 95 per cent for unwanted pregnancies among minors. 2 App. 328. Dr. Nadelson also testified that her clinic's recidivism rate for unwanted pregnancies among minors was approximately 25 per cent, 2 App. 328, and that, although the recidivism rate would vary depending upon the population studied, 25 per cent represented a fair estimate of the national or statewide recidivism rate. 2 App. 329. Finally, Dr. Nadelson testified that she and most professional people believe that counselling can help reduce recidivism. 2 App. 329. In addition, plaintiffs admitted that published

studies showed varying, and high, recidivism rates for unwanted pregnancies among minors. 1 App. 196-201.

9. *The Formal Opinion of Professional Groups Interested in the Care of Adolescents and Children Concerning the Performance of Abortion Surgery upon Minors With or Without Parental Consent*

Since the flavor of this case is highly legislative, defendants brought the views of the American Academy of Pediatrics to the District Court's attention. The Academy, after a long period of study and upon the recommendation of its Committee on Youth which defendants' expert Dr. Hazard chaired, adopted a model statute governing the ability of minors to consent to health care. This model act, published in 51 Pediatrics 293 (February, 1973), incorporates the Academy's view that minors should not be considered able to give effective consent to abortions. 2 App. 369-72; 1 App. 483-98.

Summary of Argument

Appellants make five separate arguments in this brief. The first, of the greatest length, discusses the substantive constitutional questions. The remaining four, of lesser length, deal with procedural issues and matters related to the remedy which the District Court fashioned. Each is briefly summarized below.

In the first argument, appellants urge two alternative views of the statute's constitutionality: that the Court should consider it valid because it does not affect a minor's fundamental right to make the abortion decision, or, alternatively, if it does affect this right, it does so to a permissible extent and in an acceptable manner.

The second argument turns to the consideration of procedural issues. Its purpose is to point out the role of legislative facts in this case and the serious impact which the District Court's ruling on defendants' Motion for Leave to Contact Members of the Plaintiff Class had on the development of the evidentiary record.

The third argument, again concerned with procedural matters, argues that the District Court erred in permitting plaintiffs to maintain their claims against the statute on the grounds of its facial overbreadth and vagueness. Appellants also take the position that the court's consideration of the claims of persons not before it was improper.

The fourth argument concentrates on the District Court's remedy. Here appellants argue that the injunction entered is unnecessarily broad.

The fifth and final argument deals with the District Court's alteration of this Court's order concerning the award of costs in *Bellotti I*. Quite brief, it argues that the court had no authority to require the defendants to repay to the plaintiffs a sum which this Court had previously allowed as a division of costs on appeal pursuant to Rule 57.

Argument

I. The Statute is Constitutional Because it Simply Structures the Abortion Decision Making Process of Pregnant Minors to Promote their Best Interests.

This case is different from most of the abortion-related cases which this Court has considered since 1973. It is different because the statute involved relates only to minors and, rather than imposing or authorizing outright prohibitions, simply

structures the abortion decision making process to protect the best interests of adolescents and children. The District Court's failure to appreciate the significance of these critical differences led to much erroneous reasoning and a conclusion at odds with deeply-embedded social traditions.

This Court has never determined that legislation like the statute which the District Court struck down is an impermissible exercise of the state's traditional authority to regulate the practice of medicine and to promote the best interests of its minor citizens. On the two occasions in which the Court has considered closely related issues, it suggested that the validity of such legislation may well turn upon the exact nature of the statute's requirements and the effect it has on the ability of minors to make the abortion decision. *See Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976) (*Planned Parenthood*), and *Bellotti I* at 147 (comparing its observations about the statute at issue in this case with that held unconstitutional in *Planned Parenthood*).[7] Unfortunately, the District Court was not inclined to devote sufficient attention to the difficult doctrinal problems and delicate social policy questions which proper resolution of this novel case requires. Rather, it seemed content to rely upon broad, and often inaccurate, statements of law[8] and to ignore the pressing need for subtle, rather than suffocating, judicial adjustment of evolving societal values.

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[7] Moreover, at least four members of this Court have expressed their view that a statute which lacks an explicit commitment to the traditional protective objective and the procedural safeguards of the statute involved in this case should nonetheless be considered a proper exercise of the state's police power. *Planned Parenthood* at 94-95, 102-05 (concurring and dissenting opinion of White, J., in which the Chief Justice and Rehnquist, J., joined, and Stevens, J., concurring and dissenting).

[8] See, for example, the District Court's holding, discussed in greater detail below, that "[a] minor has a basic constitutional right to an abortion. . . ." *Baird III* at 1003. *Contra*, *Maher* v. *Roe*, 432 U.S. 464, 473 (1977).

Appellants seek in this initial argument section both to provide the analytical framework within which this case may be properly decided and to convince the Court that the statute satisfies constitutional requirements. The first subsection reviews principal cases thought to involve "fundamental rights" and argues that the statute does not burden any aspect of a minor's "fundamental right to privacy" as the Court has construed that concept in relation to sexual matters, including abortions. The second subsection proceeds on the assumption that the statute does affect a minor's fundamental right to privacy and argues that the statute passes muster under the intermediate "heightened" standard of review. The fundamental theme running through this second portion of appellants' argument is well-developed in Justice Stevens's dissent in *Planned Parenthood*:

> The State's interest is not dependent on an estimate of the impact the parental-consent requirement may have on the total number of abortions that may take place. I assume that parents will sometimes prevent abortions which might better be performed; other parents may advise abortions that should not be performed. Similarly, even doctors are not omniscient; specialists in performing abortions may incorrectly conclude that the immediate advantages of the procedure outweight the disadvantages which a parent could evaluate in better perspective. In each individual case factors much more profound than a mere medical judgment may weigh heavily in the scales. The overriding consideration is that the right to make the choice be exercised as wisely as possible. *Planned Parenthood* at 104.

Because the statute is designed precisely to serve this "overriding consideration," appellants submit that the Court should

reverse the District Court's decision and hold the statute constitutional.

A. *The Statute Does not Burden a Minor's Fundamental Right to Privacy.*

1. The Aspect of a Minor's Right to Privacy which is Involved in this Case is the Right to Decide Whether to Undergo Abortion Surgery.

Almost six years ago, this Court determined that the Constitution recognizes a right of personal privacy which "is broad enough to encompass [an adult] woman's decision whether or not to terminate her pregnancy. . . ." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973) (*Roe*).[9]

This holding is unambiguous in its emphasis upon the scope of the right as extending only to the abortion *decision* and not to collateral matters except insofar as they impermissibly impinged upon that decision. *Roe* at 154-55. In reaching its conclusion the Court acknowledged its debt to another "privacy-in-decision-making" case, *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), in which the Court held that the constitutional right to privacy included the right to "be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. . . ." *Id.* at 453. Subsequent cases have reiterated the principle's formulation, frequently in reaction to its misinterpretation or misapplication by the lower federal courts. For example, in *Whalen* v. *Roe*, 429 U.S. 589 (1977), the Court rejected physicians' claims that a New York State drug reporting statute was unconstitutional because it "impair[ed] their right to practice medicine free of unwarranted

[9]The Court's decision in *Roe* explicitly denied considering the constitutionality of parental consent requirements. 410 U.S. at 165, n. 67.

state interference. . . ." *Id.* at 604. *Whalen* pointed out that the constitutional right which *Roe's* companion case, *Doe* v. *Bolton*, 410 U.S. 179 (1973),

> vindicated . . . was the right of a pregnant woman to *decide* whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedures were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her *decision*. If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected *decision*, if they had merely made the physician's work more laborious or less independent without any impact on the patient, they would not have violated the Constitution . . . [emphasis supplied]. 429 U.S. at 604, n. 33.

But applying the decision making privacy principle and distinguishing between state action which impermissibly interferes with the fundamental right to make the abortion decision and action which permissibly affects it is not a simple matter. Indeed, the difficulty of the task seems to have led the lower federal courts to ignore it and apply instead an entirely different principle: that a woman has a fundamental right to obtain an abortion. During the October 1976 Term, the Court had occasion to observe this error and to attempt to preclude its repetition. *Maher* v. *Roe*, 432 U.S. 464 (1977) (*Maher*), was an appeal from a decision of a three-judge district court holding unconstitutional a regulation of the State of Connecticut's Welfare Department denying reimbursement to health care providers for elective abortions performed on welfare

recipients during the first trimester. On appeal, this Court reviewed at length the nature of the fundamental right at issue in that and similar cases:

> At issue in *Roe* was the constitutionality of a Texas law making it a crime to procure or attempt to procure an abortion, except on medical advice for the purpose of saving the life of the mother. Drawing on a group of disparate cases . . ., [the Court] concluded that the Fourteenth Amendment's concept of personal liberty affords constitutional protection against state interference with certain aspects of an individual's personal "privacy," including a woman's decision to terminate her pregnancy [footnote omitted]. . . .
>
> . . . . . .
>
> In subsequent cases, we have invalidated other types of restrictions, different in form [from the Texas statute] but similar in effect, on the woman's freedom of choice. Thus, in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 70-71, n. 11 (1976), we held that Missouri's requirement of spousal consent was unconstitutional because it "granted [the husband] the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her pregnancy." Missouri had interposed an "*absolute obstacle* to a woman's decision that *Roe* held to be constitutionally protected from such interference." (Emphasis added.) Although a state-created obstacle need not be absolute to be impermissible [citations omitted], we have held that a requirement for a lawful abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion." *Bellotti* v. *Baird*, 428 U.S. 132, 147 (1976). . . .

> These cases recognize a constitutionally protected interest "in making certain kinds of important decisions" free from governmental compulsion. *Whalen* v. *Roe*, 429 U.S. 589, 599-600, and nn. 24 and 26 (1977). As *Whalen* makes clear, the right in *Roe* v. *Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it. *Roe did not declare an unqualified "constitutional right to an abortion,"* as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. . . [emphasis supplied]. 432 U.S. at 471-474.

Despite this Court's decision in *Maher*, the District Court held that "[a] minor has a basic constitutional right to an abortion [citations omitted]." *Baird III* at 1003. This determination, while appearing in the middle rather than at the beginning of the court's decision, is the obvious starting point of the court's substantive constitutional analysis. It is also, equally obviously, an incorrect one, *Maher* at 474, and the Attorney General submits that this unjustifiable legal error requires rejection of the District Court's decision.

There is more, however, to be learned from this Court's prior decisions than that the District Court interpreted them incorrectly in this case. Moreover, this additional learning is essential to proper decision, either in the District Court upon remand or in this Court should the questions involved seem appropriate for ultimate disposition. Critical in this regard is the settling of the boundaries of a minor's — as opposed to an adult's — right to privacy in abortion-related decision making cases such as this.

In *Planned Parenthood*, this Court held unconstitutional a Missouri statue requiring a physician to obtain the consent of a

minor's parent before performing abortion surgery. Mr. Justice Blackmun wrote the Court's opinion in which Justices Brennan, Marshall, Powell, and Stewart joined. However, Justice Stewart also wrote a separate concurring opinion, in which Justice Powell joined, "to indicate [his] understanding of some of the constitutional issues . . . ." 428 U.S. at 89. Justice Stewart's views concerning the statute's parental consent requirement, while consistent with the Court's, focus on the statute's "absolute limitation on the minor's right to obtain an abortion. . . ." *Id.* at 90. Thus, limiting the holding to its essentials and respecting Justices Stewart's and Powell's separate reasons for endorsing it, *Planned Parenthood's* incremental contribution to the constitutional principles applicable to abortion-related cases involving the rights of minors is the recognition of the unacceptability (parallel, of course, to the view as to adults expressed in *Roe*) of an *absolute* prohibition.

In *Carey* v. *Population Services International*, 431 U.S. 678 (1977), decided almost one year after *Planned Parenthood*, the Court was unable to agree that a minor's right to privacy, in particular that aspect of it concerned with the making of decisions related to sexual activity and reproduction, justified holding a New York statute prohibiting the sale of contraceptives unconstitutional as applied to the sale of nonprescription contraceptives to persons under sixteen years of age.[10] Perhaps reflecting this disagreement, the plurality opinion noted that "[t]he question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible to precise answer. . . ." *Id.* at 692. Appellants do not propose to attempt

[10] Justice Brennan wrote a plurality opinion in which Justices Stewart, Marshall, and Blackmun joined; Justices White, Stevens, and Powell concurred in the result or judgment on the basis of independent reasoning; and the Chief Justice and Justice Rehnquist dissented. 431 U.S. 691, n. 12, 702-04, 713-17.

to provide that which has eluded a majority of the Court, nor do they think such an effort necessary, for analysis of the reasoning of the individual Justices in *Carey*,[11] when first compiled with the principle recognized in *Planned Parenthood*, yields a formulation of a minor's right to privacy in the context of decision making concerning sexual matters which is at once both consistent with prior decisions and dispositive of appellees' claims against the statute in this case.

Justice Powell begins the expression of his views in *Carey* with the statement that "[t]here is also no justification for subjecting restrictions on the sexual activity of the young to heightened judicial review." 431 U.S. at 705. Extracted from its context and considered merely as an abstract matter of logic, this statement might be thought to imply that, since a fundamental right must be affected before a statute is subjected to heightened scrutiny, if heightened scrutiny is not appropriate, no fundamental right is involved. Hence, the statute at issue in this case, as one affecting the "sexual activity of the young," would clearly be constitutional. However, since Justice Powell later points with approval to *Planned Parenthood*, it seems more reasonable to conclude that, while willing to make constitutional protections against *outright prohibitions* which affect protected decision making available to adolescents and children as well as to adults, Justice Powell is inclined to go no further. *See Maher* at 474 (regulation simply denying Medicaid benefits for elective abortions "does not impinge upon the fundamental right recognized in *Roe* [footnote omitted] . . .").

[11] Consideration of the views of the plurality, since they are based upon a broader conception of the fundamental right at issue than a majority of the Court has accepted, is deferred to Argument Section B, below. In that section, appellants assume that the statute affects a fundamental right; here their purpose is to demonstrate that a majority of the Court has suggested that it does not.

Justice Stevens's views are also instructive. Justice Stevens dissented in *Planned Parenthood*, and he regards the situation in *Carey* as less persuasive.[12] Nevertheless, he concluded that the New York statute was unconstitutional because its infliction of "government-mandated harm" was "irrational and perverse" and might be "appropriately characterized as a deprivation of liberty without due process of law. . . ." 431 U.S. at 716.

Finally, Justice White, who also dissented in *Planned Parenthood*, expressed his view that the state was under some obligation to demonstrate a measurable correlation between the statute's purposes and the means it employs to achieve them. While this demonstration requirement is logically suggestive of an obligation upon the state greater than that usually associated with review under ordinary scrutiny standards, an interpretation more harmonious with Justice White's previously expressed views would be that, while heightened scrutiny is not warranted, assertions of state interests, when contradicted by common sense, will not suffice to satisfy the basic constitutional requirement that a statute "rationally [serve] valid state interests." 431 U.S. at 707 (Powell, J., concurring in part and concurring in the judgment).

Read together, the various opinions in *Planned Parenthood* and *Carey* suggest that this case may be decided by applying the following test: the statute at issue in this case is constitutional if the state demonstrates a reasonable relationship between the interests it is designed to serve and the methods it uses and unless it interferes with a minor's fundamental right to make the abortion decision by either (1) imposing an outright prohibition upon a legitimate alternative or (2) working

[12] "Consequently, even if I had joined that part of *Planned Parenthood*, I could not agree that the Constitution provides the same measure of protection to the minor's right to use contraceptives as to the pregnant female's right to abort." 431 U.S. at 713.

a deleterious distortion in the process of deciding by associating "government-mandated harm" with the choice of such an alternative. As the following section establishes, the statute creates no such interference.

2. The Court Should Conclude that the Statute is Constitutional Because it Does not Proscribe Abortions or Work a Deleterious Distortion in a Pregnant Minor's Decision Making Process.

The dispositive difference between the Commonwealth's statute and the enactment which the Court held unconstitutional in *Planned Parenthood* is that Missouri's statute contained a "blanket provision" which this Court held authorized a parent to withhold consent for any reason, thus "giv[ing] a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." 428 U.S. at 74. The Massachusetts statute, in contrast, clearly precludes such an abuse of the traditional parental authority to consent to medical treatment on behalf of children. As the Supreme Judicial Court wrote in answer to the District Court's certified questions,

> . . . there is no absolute parental veto inherent in § 12[S]. If the word veto has an application here, it is, by analogy to the legislative process, a veto which may be overriden [by a judge of the Superior Court]. *Attorney General* at 106-07, 360 N.E. 2d at 294.[13]

Despite this binding interpretation of the Commonwealth's highest court, plaintiff-interveners, in their motion to affirm

[13] The Supreme Judicial Court's decision is considered in detail in subsection B, below.

summarily,[14] insist that the statute imposes the type of "absolute, possibly arbitrary veto" which this Court determined in *Planned Parenthood* infringed impermissibly upon a minor's fundamental right to make the abortion decision.[15] The answer to this argument is as short as it is obvious: there is nothing "arbitrary" about a carefully considered judicial judgment which includes a conclusion concerning the best interests of a minor which is different from that of the adolescent or child. Indeed, appellants consider incredible plaintiff-interveners' suggestion that this Court intended in *Planned Parenthood* to prohibit the time-honored exercise of judicial superintendence which the Supreme Judicial Court so reasonably described in *Attorney General*:

> Question 2(b) [of the certified questions] concerns what a judge must do in passing on the question whether the best interests of the minor will be served. Unless a contrary conclusion is compelled constitutionally, we do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge must make a determination of those circumstances, but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him. We suspect that the judge will give great weight to the minor's determination, if informed and reasonable, but in circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should

[14] Motion to Affirm of Appellees Planned Parenthood League of Massachusetts, et al., at 11-13.

[15] To an uncertain degree, the District Court seems to share this view. *Baird II* at 856; *see Baird III* at 1003 and 1004.

> prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact. *Attorney General* at 104, 360 N.E. 2d at 293.

To appellants, these remarks, far from evidencing disregard of this Court's holding in *Planned Parenthood*, represent a thoughtful judicial application, well-supported by established principles of equity jurisdiction, of traditional concerns which all members of the Court have recognized as valid. *Planned Parenthood* at 94-95 (White, J., concurring in part and dissenting in part and joined by the Chief Justice and Justice Rehnquist); *id.* at 101-05 (Stevens, J. concurring in part and dissenting in part); *Carey* at 693, n. 15 (Brennan, J., expressing his own view and the views of Stewart, Marshall, and Blackmun, JJ.); *id.* at 705-07, 709-10 (Powell, J., concurring in part and concurring in the judgment). This Court should conclude that such a careful process is quite unlike the provision struck down in *Planned Parenthood* and, therefore, that it does not constitute a potential outright prohibition which infringes impermissibly upon a minor's fundamental right to make the abortion decision.

That the statute is also unobjectionable under the second aspect of a minor's fundamental right, that entitling the decision to abort to protection from discouragement through the association of its choice with "government-mandated harm," is also certain. The statute is neutral on its face and does not discourage the selection of any of the various legitimate alternatives which comprise the abortion decision. It is also inherently neutral in application as a result of its reliance upon the best interest standard. As the Supreme Judicial Court held in *Attorney General*, "[The judge] must disregard all parental objections, and other considerations, which are not based exclusively on what would serve the minor's best interests. . . ."

Attorney General at 103, 360 N.E. 2d at 293. Thus, unlike the New York statute in *Carey*, the Commonwealth does not seek to impose any sanction on the decision to abort, symbolic or otherwise. Rather, its clear purpose is to assure sound decision making in an area which all the experts who testified at the second trial agreed is fraught with difficulty for adolescents and children. 2 App. 546-63. A rule such as the one appellees propose and the District Court endorsed in part, *Baird III* at 1002-03, which prohibits the state from providing judicial protection for minors who find themselves unhappily pregnant, would be an odd extension of a minor's fundamental right to make the abortion decision, and it would certainly lack the justification of a response to the imposition of "government-mandated harm."

As traditional a purpose as the statute has, its means for achieving its goals are perhaps even more firmly rooted in our social structure. In deciding to require physicians to assure that adolescents and children have consulted with their parents before performing abortion surgery, the Massachusetts Legislature accepted the view long expressed at common law that, because their natural instinct to care and nurture surpasses the interest of any other person, a child's parents are the best guardians of its welfare. 1 W. Blackstone, *Commentaries*, Ch. 16 (natural duty of parents to maintain their children, while enforced by laws, is best guaranteed by "Providence . . . by implanting in the breast of every parent that natural or insuperable degree of affection . . ." which neither the individual parent's depravity nor rebellious children can totally extinguish); *In re Agar Ellis*, 24 Ch. D. 317, 329 (1883) (Cotton, L.J., concurring: court's determination of child's best interests must have "regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice . . ."). Parental consultation, then, is the well-accepted method of supporting

children in times of crisis and helping them make sound decisions. So clear is this general truth that all of the experts who testified at the second trial readily acknowledged it. 2 App. 390; 539-42; 579.

The District Court concluded that, while parental consultation as a general matter is advisable, the fact that some parents — the evidence suggests a small minority, 2 App. 539-42; see *Baird III* at 1002 — may not be supportive of their children is a sufficient reason to hold the statute unconstitutional on its face. *Baird III* at 1002-03. Passing for the moment the problems which such a draconian result unjustifiably creates,[16] appellants submit that, as with the general soundness of the statute's provision for judicial superintendence, its requirement of parental consultation is quite unlike the restrictions upon the distribution of contraceptives in *Carey* which Justice Stevens considered "perverse and irrational." Beneficent both in facial purpose and in the great majority of applications, strongly supported by basic social assumptions, and uniformly accepted by the experts who testified at the second trial as generally essential to the healthy development of adolescents and children, 2 App. 380; 539-42, parental consultation is a good thing, not a bad one, and the statute deserves respect, rather than condemnation, for encouraging and relying upon it. *See Carey* at 709-10 (Powell, J., concurring in part and concurring in the judgment); *Planned Parenthood* at 101-05 (Stevens, J., concurring in part and dissenting in part).

The final provision which the District Court thought justified the conclusion that the statute is unconstitutional is closely related to its reliance upon judicial superintendence and parental consultation: withdrawal of the Commonwealth's quite limited "mature minor" rule.[17] Once again, however,

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[16] These issues are discussed in Argument III, below.

[17] The Supreme Judicial Court's discussion of Massachusetts' "mature minor" rule and the District Court's erroneous view of state law in light of

the Legislature's purpose in providing greater legal protection to pregnant adolescents and children than it judges necessary in other situations[18] is not to harm its minor citizens but rather to promote their best interests. The important distinction of judgment and one which, although appellees and the District Court may question it, the Attorney General maintains is peculiarly and properly for the Legislature, is that there is no "right" answer to the abortion decision. Unlike prenatal care, the treatment of venereal disease, or other health care problems for which the choice of therapy and the need for medical intervention are obvious, and thus the operation of a "mature minor" rule appropriate, see Mass. Gen. Laws Ann. ch. 112, § 12F, and ch. 111, § 117 (West Supp. 1978), the abortion decision includes at least two alternatives, completion of pregnancy and abortion, which are mutually exclusive and vary in their appropriateness depending upon a minor's individual circumstances. 2 App. 561-63; 582-83; 587. Such considerations, in addition to those which the Supreme Judicial Court mentioned in *Attorney General* at 107, 112, 360 N.E. 2d at 294, 297, and this Court noted in *Maher* at 480 (state may impose different requirements affecting abortion decision under welfare program since "other procedures do not involve the termination of a potential human life . . ."), well justify the Legislature's decision to provide the greatest protection possible to adolescents and children faced with an unanticipated pregnancy. Thus, the withdrawal of the mature minor rule is an appropriate means, among the others which the stat-

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the Massachusetts' court's comments are discussed in detail in subsection B, below.

[18] The broad statutory and, hence, presumably the limited judicial "mature minor" rule as well, are also inapplicable in cases involving methadone maintenance therapy and sterilization. Mass. Gen. Laws Ann. ch. 112, §§ 12E and 12F (West Supp. 1978); *see Attorney General* at 110, n. 9, 111, 360 N.E. 2d at 296, n. 9, 297. See subsection B, below.

ute employs, for promoting sound decision making. The District Court's invalidation of this difficult legislative decision and the substitution of its own judgment as to the proper approach, see *Baird III* 1003-04, finds no support in this Court's cases and deserves firm rejection.

In summary, the abortion decision, unlike those decisions considered in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), and *Carey*, involves an intense, unavoidable conflict of values which often seriously troubles those who must choose. 2 App. 552-53. It is also a decision which, lacking a "right" answer, must be made as carefully as possible, since the process of deciding plays a critical role in helping the pregnant woman avoid psychological trauma and provides much of the justification for the ultimate choice. These attributes, strong enough in the case of adult women, are generally thought to overpower the young. 2 App. 502-03. This Court should conclude that the state has the authority to recognize the peculiar difficulty of the abortion decision and to call upon our society's long-standing approaches to protecting its minor citizens, parental support and judicial superintendence, to provide the necessary help. *See Planned Parenthood* at 91 (concurring opinion of Justice Stewart in which Powell, J., joined); *id.* at 101-05 (Stevens, J., concurring in part and dissenting in part). Recognition of the appropriateness of these methods renders the special concerns which prompt invocation of fundamental right analysis (outright prohibitions and "government-mandated harm") inapposite, and the Court should thus conclude that the statute does not affect a minor's fundamental right to make the abortion decision. Therefore, since under ordinary standards of judicial scrutiny, see *Maher* at 478-81; *Carey* at 707 (Powell, J., concurring in part and concurring in the judgment), the statute is clearly constitutional, the District Court's decision to the contrary should be reversed.

B. *The Statute Serves Significant State Interests in a Manner Long Recognized at Common Law, and the Court Should Therefore Determine that it is Constitutional.*

A conclusion that the statute does interfere with a minor's fundamental right to make the abortion decision may permit this Court to review its provisions under stricter constitutional standards.[19]

While appellants believe that "heightened" scrutiny of the statute, for the reasons discussed in the previous subsection, is inappropriate, they recognize that disagreement on this point exists among members of the Court, and the purpose of the argument presented in the following pages is to demonstrate that the Court should consider the statute constitutional even if it is subjected to heightened judicial review.[20]

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[19] Cases that suggest that the implication of a fundamental right, sufficient to trigger heightened scrutiny in matters involving adults, need not do so if the challenged legislation is aimed at minors include *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971) (although "fundamental to American scheme of justice," minors not entitled to trial by jury in juvenile deliquency proceedings); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (minors may be denied right to vote); and *Ginsberg* v. *New York*, 390 U.S. 629 (1968) (minors' First Amendment rights may be restricted in a manner which would be unconstitutional if adults involved). However, since the result of concluding that the statute interferes with a minor's fundamental right to make the abortion decision but, on the basis of *McKeiver*, *Mitchell* or *Ginsberg*, refusing to subject the statute to heightened scrutiny, would be to review it under ordinary standards, and since it is clear that the statute satisfies these standards, appellants do not discuss this possibility separately.

Moreover, it does not matter whether the presence of a suspect classification in a statute affecting minors could trigger strict scrutiny, *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 16 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 342-43 (1972), because no suspect classification is involved in this case.

[20] Since the highest level of scrutiny does not apply to legislation affecting minors, appellants do not analyze the statute's provisions according to "strict scrutiny" requirements. *Carey* at 693 and n. 15 ("[s]tate restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult . . .' [citing *Planned Parenthood*]" and noting that "[t]his test is apparently less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults . . .") (plurality opinion of Brennan, Stewart, Marshall, and Blackmun, JJ.); *id.* at 702-03 (White, J., concurring in part and concurring in the result); *id.* at 703, 705-07 (Powell, J., concurring in part and concurring in the judgment); *id.* at 713-14 (Stevens, J., concurring in part and concurring in the judgment); *see id.* at 717-19 (Rehnquist, J., dissenting). Rather, analysis is limited to the statute's validity under the "middle tier" of scrutiny. See *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972); *Reed* v. *Reed*, 404 U.S. 71, 76 (1971); L. Tribe, *American Constitutional Law*, 1082-92 (1978); Gunther, *The Supreme Court, 1971 — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 30-36 (1972) (all discussing "middle tier").

In addition, appellants do not treat equal protection considerations, with the exception of those related to the Commonwealth's limited "mature minor" rule and a comparison of the statute's provisions with those of Mass. Gen. Laws Ann. ch. 112, § 12F (West Supp. 1978), separately from substantive due process concerns since, at least in this area of the law, little difference now seems to exist between criteria used or results obtained under these two formerly more distinct aspects of the Fourteenth Amendment. *Hathaway* v. *Worcester City Hospital*, 475 F. 2d 701, 706, n. 5 (1st Cir. 1973) ("[a]lthough we frame our holding in equal protection terms, we note that *Roe* and *Doe* establish that the same compelling interest analysis applies when fundamental rights are adjudicated in due process terms . . ."); *see Baird III* at 1004 (court regards statute as "imposing an undue burden in the due process sense and a discriminatory denial of equal protection . . ."); L. Tribe, *American Constitutional Law*, 992, n. 13 (citing examples in which the due process and equal protection clauses of the Fourteenth Amendment "have . . . been held to yield [indistinguishable] norms of equal treatment . . ."); *cf. Maher* at 473 (in context of equal protection challenge, Court referred to both "undue burden" and "degree and justification" language in *Bellotti I* as suggesting contours of fundamental rights analysis).

1. The Statute Advances Significant State Interests for Which the States Have Traditional Responsibility.

That the state has the authority, indeed the obligation, to promote the best interests of its minor citizens is a proposition inherited from the English common law and now well-estab-

lished in our own jurisprudence. *See, e.g., Wellesley* v. *Wellesley*, 4 Eng. Rep. 1078 (H.L. 1828) (power of Court of Chancery, recognized for over 150 years, to promote best interests of minors on King's behalf as parens patriae is not open to question); *Eyre* v. *Shaftsbury*, 24 Eng. Rep. 659, 664 (Ch. 1722) ("the King is bound of common right, and by the laws to defend his subjects . . ."). Blackstone traces the doctrine back to Fitznerbert's Naturia Brevium, 3 W. Blackstone, *Commentaries* *427, a source which Story characterizes as "a very ancient work of great authority . . . ," 2 Story, *Equity Jurisprudence* *666, and Story himself considered the power well-established. *Id.* at *672. Perhaps the most persuasive recent explanation in a constitutional context of this obligation and the increased authority over adolescents and children which it justifies the state's exercising appears in Mr. Justice Stevens's dissent in *Planned Parenthood*, cited with approval by the plurality in *Carey*:

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible. Therefore, the holding in *Roe* v. *Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the

> state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision. *Planned Parenthood* at 102; *Carey* at 693, n. 15.

Appellants recognize that, under *Planned Parenthood*, legislation which interferes with a minor's constitutional right to make the abortion decision must have as its purpose interests which are "significant," and not just "legitimate," and that these interests must be a function of the peculiarities of youth and immaturity, and not just interests which are "present in the case of an adult." *Id.* at 74-75. Of course, the Court has already suggested that a minor's immaturity is itself a sufficient basis for requiring parental consultation subject to judicial superintendence, *Planned Parenthood* at 75; *Bellotti I* at 147-48, and the evidence introduced at the second trial supports the Legislature's implicit determination that the abortion decision, unlike many other health care decisions minors may make, is sufficiently difficult and troublesome to warrant special statutory provisions intended to "maximiz[e] the probability that [it] be made correctly and with full understanding of the consequences of either alternative." *Planned Parenthood* at 103 (Stevens, J., dissenting).

A desire to provide protection against improvident decision making related to a minor's immaturity or the other peculiar problems of adolescence and childhood, 1 App. 248-50, is, of course, a significant state interest with which the state need not be concerned in the case of adults. In addition, recognition of the difficulties of adolescence and a determination to sanction what all the experts who testified at the second trial agreed is the best source of assistance to pregnant and frequently distressed teenagers and children — parental consultation and support — is also a significant interest unique to the

circumstance of minority. Finally, the evidence compiled at the first trial identifies an additional interest which the state may reasonably consider uniquely related to the protection of minors: the willingness of some abortion clinics and physicians, including the appellees in this case, to perform abortion surgery upon adolescents and children without providing the counselling which plaintiffs' own expert testified is essential to a minor's healthy psychological development and an effective method of reducing the rate of unwanted pregnancy recidivism. See *Planned Parenthood* at 91, n. 2 (Stewart, J., concurring and reviewing record in *Bellotti I*); 2 App. 504-05. Appellants submit that the record in this case as well as long-recognized social assumptions embodied in our common and constitutional law demonstrate that the statute indeed serves significant state interests and thus satisfies the initial requirement of heightened judicial scrutiny.

2. The Statute Employs Appropriate Means to Accomplish its Purposes, Means which have Long Been Recognized as Within the Police Power and the Functions of the Judiciary.

The Supreme Judicial Court's answers to the District Court's certified questions in *Attorney General* provide a detailed discussion of the means which the Legislature chose to advance the significant state interests just discussed. While the statute's conduct-conforming device is a prohibition against a physician's performing abortion surgery upon an unmarried minor unless a set of preconditions is satisfied, the preconditions themselves are the Legislature's principal tools for working its will, and there are four of them: first, consent of the pregnant adolescent or child; second, consent or consultation with the minor's parents; third, in those cases in which the minor and her parents disagree, a provision for judicial

superintendence of the decision; and, fourth, application of the best interests standard at all appropriate points in the decision making process.[21]

All of these methods of promoting sound decision making by minors and, hence, of advancing their best interests are time-honored, appropriate means for achieving the Legislature's ends. The statute's first precondition, that a physician obtain a minor patient's consent before performing abortion surgery upon her, is consistent with the Legislature's desire to provide increased protection to pregnant adolescents and children. At common law, since the consent of a minor to a medical or surgical procedure was ineffective, physicians were under no compulsion to secure it and could deal with the parents alone. *In re Seiferth*, 309 N.Y. 80, 87, 127 N.E. 2d 820, 824 (1955) (Fuld, J., dissenting); *In re Sampson*, 65 Misc. 2d 658, 670, 317 N.Y.S. 2d 641 (Ulster Cnty. Fam. Ct. 1970) (quoting with approval Judge Fuld's dissent in *Seiferth*), *aff'd*, 29 N.Y. 2d 900, 278 N.E. 2d 918 (1972); *see In re Hudson*, 13 Wash. 2d 673, 709-10, 126 P. 2d 765 (1942) (decision to permit minor to undergo surgery is responsibility of parents). Thus, the statute's initial precondition works a salutary change in the common law and, since *Planned Parenthood* approved a state statute requiring physicians to obtain the consent of their adult women patients, the Court should approve this precondition *a fortiori*.[22]

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[21] Additional mechanisms related to the judicial superintendence function, e.g., availability of counsel, expedited judicial consideration, and so forth, are fully discussed in *Attorney General* and were not subject to criticism in the District Court. Indeed, the District Court declared the functioning of the court process a "non-issue," 1 App. 153, and did not afford it separate treatment.

[22] Of course, under the terms of the District Court's injunction, appellants may not enforce even this uncontroversial provision.

The statute's second precondition, as construed by the Supreme Judicial Court in *Attorney General*, is that a physician must obtain the consent of both of a pregnant minor's parents before performing surgery. According to the Supreme Judicial Court, this consent is required, if such a requirement is constitutional, in all cases and without regard to the availability of the Commonwealth's limited mature minor rule in other situations. *Attorney General* at 105-12, 360 N.E. 2d at 293-97. While the District Court thought it should deny the Legislature this means of achieving its goals, more careful and sympathetic consideration of the problems involved than the District Court was inclined to give leads to the opposite conclusion.

As an initial matter, one should realize that, prior to the statute's enactment, the status of the Massachusetts rule governing parental consent to the provision of medical or surgical care was not entirely clear. Although the District Court seemed content to rely upon evidence of professional practice (and quite limited evidence at that, see Argument Section II, below, and *Baird I* at 854), legal sources suggest that, at least in certain situations, the consent of both parents may be necessary. *Cf. Reddington* v. *Clayman*, 334 Mass. 244, 246-47, 134 N.E. 2d 920, 921-22 (1956) (battery action against surgeon by parents for unauthorized removal of tissue during tonsillectomy suggesting consent of both parents required); 1966 Op. A.G. 247 (in which the Attorney General advised the Commissioner of Mental Health to obtain the consent of both of a minor patient's parents); *see also* Mass. Gen. Laws Ann. ch. 201, § 5 (West Supp. 1978) (parents share custody of their child "jointly"). Not only did the statute resolve this ambiguity in the case of abortions, but it did so for perfectly sound reasons. Given the difficulty of the abortion decision, the implications it has for the individual child, her parents, and the family, and the real possibility that parents themselves may disagree over the proper decision and profit from consultation

with their daughter and discussion between themselves, the statute's dual consent requirement makes good sense. Appellants submit that the Legislature should not be denied the ability to rely upon parental collaboration in its effort to assure sound decision making.[23]

The second aspect of the parental consent precondition is that it is applicable in all situations. Postponing consideration of the withdrawal of the Commonwealth's limited "mature minor" rule to the following separate equal protection section, appellants concentrate here on the District Court's dissatisfaction with the Legislature's decision to impose a uniform requirement. See *Baird III* at 1004. Legislative judgments, by their nature designed for the general case, are often subject to criticism in particular circumstances. This type of critique, however, is generally not thought a sufficient reason to invalidate a statute on its face, even if it implicates fundamental rights. *Cf. Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), discussed further in Argument Section III, below. Moreover, recognition of the general acceptability of a legislative determination is particularly appropriate when the standard of review is merely more stringent rather than strict. In this case, the District Court determined on the basis of only one expert's opinion that a small number of minors in Massachusetts would find their parents unsupportive if they consulted them. The Legislature might well have assessed the probabilities differently or judged, with Blackstone, that the force of natural parental affection would ultimately rally even the most distressed parents to their daughter's aid. As Justice Stevens wrote in *Planned Parenthood*,

[23] Previous decisions of this Court have recognized the importance of the family unit in our society. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

> If there is no parental-consent requirement, many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will exercise his or her veto arbitrarily to further a selfish interest rather than the child's interest. *A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision* . . . [emphasis supplied]. *Planned Parenthood* at 103-04.

Implicit in Justice Stevens's view is acceptance of the possibility, which appellants also acknowledge, that some parents will disappoint their children and frustrate the Legislature's effort to promote sound and compassionate decision making. However, appellants submit that the Court should consider such a possibility, undeniably an unlikely one, 2 App. 539-42, an insufficient basis for sustaining a facial attack against the statute, especially when the challenged provision is also, in the vast majority of cases, undeniably salubrious.

The statute's third and fourth preconditions, judicial authorization in the case of disagreement among daughter and

parents and application of the best interests standard, need only the briefest comment. As the Supreme Judicial Court points out in *Attorney General*, the courts of the Commonwealth have long acted as guardians of the state's young citizens. *Attorney General* at 109-10, 360 N.E. 2d at 296. In doing so, they have consistently been guided by a paramount concern for the child's welfare. *Id.* Judicial authorization and the best interests standard, then, are two of the Commonwealth's traditional means for providing special protection to minors, and there should be no doubt that their use to advance the statute's purposes is well within the Legislature's competence.

The choice of means to achieve governmental goals has long been the legislature's responsibility. This Court has recognized that federal judicial supervision of the discharge of this responsibility by state government should generally be deferential and, in the case of legislation affecting minors, particularly so. The District Court, proceeding on the basis of an erroneous legal theory, see page 23, above, determined to prescribe its view of the proper methodology, and steadfast in its unwillingness to accept the statute's declared purpose, see *Baird III* at 1004, concluded that the statute should be rejected on its face and in its entirety. Appellants submit that, when judged according to the proper legal standard, without a prescriptive purpose, and with acceptance of its authoritatively determined goals, the statute warrants approbation. Therefore, this Court should conclude that the statute is a constitutional exercise of the Legislature's traditional authority and reverse the District Court's determination to the contrary.

3. The Statute Does not Deny Equal Protection of the Laws to Pregnant Minors.

Without articulating its standard of review, the District Court concluded that the statute denied mature, unmarried pregnant minors equal protection of the laws. The court's conclusion was apparently prompted by the Legislature's determination not to permit physicians to rely upon the Commonwealth's limited "mature minor" rule when undertaking to perform abortion surgery upon adolescents and, in addition, by the Supreme Judicial Court's decision that, unless barred by constitutional considerations, conscientious performance of a judge's duties under the statute required consideration of "all the relevant views presented to him," *Attorney General* at 104, 360 N.E. 2d at 293, and not just the assessment of a minor's "maturity." In addition, plaintiffs argued that the statute, when read in conjunction with Mass. Gen. Laws Ann. ch. 112, § 12F (West Supp. 1978) (§ 12F), also violates equal protection requirements. The District Court's reasoning, based as it is upon a fundamental misreading of the Supreme Judicial Court's opinion in *Attorney General*, is amenable to summary refutation once this error is apprehended; similarly, an adequate response to appellees' § 12F argument is available in *Attorney General*.

The District Court begins its analysis of "the mature minor and unequal protection" by stating that the Supreme Judicial Court determined in *Attorney General* that "Massachusetts did have *the mature minor rule*, but that the statute rejected it with respect to abortions . . . [emphasis supplied]." *Baird III* at 1003. But the Supreme Judicial Court did no such thing. Indeed, despite defendants' urging before it, the Court explicitly refused to adopt the "mature minor" rule which it acknowledged prevailed in other jurisdictions:

> We think, however, that it may be of assistance to the District Court to state the extent to which a mature minor rule of the character urged by the defendants would have been applicable if § 12[S] had not been passed. By doing so, we will disclose the impact of § 12[S] on the rights of minors.
>
> A mature minor rule has been accepted in other jurisdictions, thereby relaxing the harshness of a rigid requirement of parental consent. . . .
>
> Our cases have given no explicit sanction to the view that, without parental involvement, an unemancipated but mature minor may consent to an operation, where one or both parents are available and where there is no medical emergency. . . .
>
> We conclude that, apart from statutory limitations which are constitutional, *where the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth* . . . [emphasis supplied]. *Attorney General* at 108-09, 111, 360 N.E. 2d at 295-96.

That the Supreme Judicial Court was willing to adopt only a very limited version of the "mature minor" rule really could not be clearer.[24]

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[24] The Supreme Judicial Court's reluctance in this regard may be explained by its view of Mass. Gen. Laws Ann. ch. 112, § 12F (West Supp. 1978), discussed below, as a "legislative mature minor rule." *Attorney General* at 111, n. 9, 360 N.E. 2d at 296, n. 9. In light of the Legislature's recent interest in the area, the court may have thought it inappropriate to supply judge-made law.

Thus, in Massachusetts, it simply is not true that a physician may perform, say, abdominal, non-emergency surgery upon an unmarried minor not within the scope of § 12F without first obtaining parental consent and then hope to defend successfully against a subsequent action for battery on the basis of the "mature minor" rule, for this defense would be available only in the limited circumstances described in *Attorney General* (i.e., when a mature minor's best interests would be advanced by avoiding parental consultation). More pertinently, it is not true that, but for the statute, an unmarried mature minor might consent to abortion surgery and a physician thus be relieved from the obligation to obtain parental consent. Rather, the consent of such an adolescent would be sufficient only if it would be in her best interests not to consult with her parents.

The District Court's misapprehension of Massachusetts' limited "mature minor" rule also seems to have contributed to its objections concerning the role of a judge in proceedings under the statute involving mature minors. The essence of the District Court's criticism seems to be that the statute, as construed by the Supreme Judicial Court, authorizes a judge to consider "all relevant views presented to him" in order to determine a minor's best interests, rather than confining his inquiry to those facts which are probative of a minor's maturity. But of course, under the limited Massachusetts mature minor rule, parental consent may be dispensed with only if doing so is in a minor's best interests. Thus, a determination of this question must be made at some point, and there is no reason to think it objectionable for a judge to do it in advance of the performance of surgery rather than for a jury to do it afterwards in the context of an action for battery or malpractice. In short, once the scope of the Massachusetts "mature minor" rule is properly understood, the statute's effect upon its operation becomes much narrower than the District Court

thought, and this narrowed availability of a rule which itself lacks constitutional dimensions should not precipitate a conclusion of unconstitutionality.

As far as appellees' § 12F claim is concerned, the Attorney General sees little need to add to the Supreme Judicial Court's comments on the subject in *Attorney General*. See *id.* at 123-26, 360 N.E. 2d at 302-03. The one additional point worth making is that *Attorney General* was written before this Court's decision in *Maher*, and it seems obvious that this Court recognized in *Maher* that the very nature of the abortion decision, in addition to its unusual difficulty and the psychological implications previously discussed, is itself a sufficient reason for the Legislature's treating it differently from other decisions concerning medical and surgical care. *Maher* at 480 ("[t]he simple answer to the argument that similar requirements are not imposed for other medical procedures is that such procedures do not involve the termination of a potential human life . . .").

C. Conclusion

Appellants submit that this Court should be reluctant to disagree with the Massachusetts Legislature over the proper balance to strike between the competing values and alternative methods for protecting pregnant adolescents and children which this case involves. For, in addition to the problems discussed at length in the preceeding pages, there are innumerable additional matters, factual, legal, and ethical,[25]

[25] See, e.g., the testimony of defendants' expert witness, Dr. Ernest Krug, concerning the ethical problems physicians face when their minor patients request them to refrain from telling their parents of their pregnancy. 2 App. 446-52.

which only a legislative body can hope to consider properly. Recognition of the limitations of substantive due process adjudication should lead the Court to uphold the statute's facial validity and leave further refinements in its operation to the legislature, an "ultimate guardian . . . of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. R. Co.* v. *May*, 194 U.S. 267, 270 (1904), cited in *Maher* at 480.

II. The District Court Abused its Discretion in Refusing to Permit Appellants to Conduct a Survey of the Parental Consent Requirements of Massachusetts Health Care Providers and, as a Result, Based its Decision on an Inadequate Record.

In their Initial Statement of Disputed Material Facts, 1 App. 125-40, the defendants suggested to the District Court that a large number of facts, legislative in nature, were in controversy and that proper decision required their development through trial. The District Court agreed with defendants' position and denied plaintiffs' motion for summary judgment. 1 App. 152. Among the facts which the defendants included in their Initial Statement as material and in dispute were questions concerning the parental consent practices of Massachusetts health care providers which provide medical and surgical services to adolescents and children. 1 App. 135, 137-39. The importance of this information is its nature as a benchmark against which the statute's requirements might be compared: if the statute merely codifies existing professional practice or otherwise only slightly alters requirements which most physicians in Massachusetts must already meet before performing abortion surgery upon minors, its provisions should not be considered a significant source of interference with a minor's constitutional right to make the abortion decision.

Ethical considerations contained in the Code of Professional Responsibility as adopted by the Supreme Judicial Court, see Sup. J. Ct. Rule 3:22, DR 7-104(A) and E.C. 7-18 (1972), made it necessary for defendants to seek the District Court's permission before they sought to contact Massachusetts health care providers since many of the institutions were members of the plaintiff classes. Motion to Certify Plaintiffs' Class; *Baird I* at 850-52. Despite the fact that the plaintiffs did not object to defendants' proposed survey as long as they received a copy of the survey materials, the District Court denied defendants' request. 1 App. 295-96.

Cases involving substantive due process challenges to the constitutionality of state statutes require the federal courts to make difficult determinations of legislative fact. Indeed, the Chief Justice commented on this problem in *Doe* v. *Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring), and recognition of it in other contexts, including both economic regulation and important personal rights, has led the Court to disavow an interest in substantive due process and the concomitant responsibility for finding legislative facts in order to arrive at sound rules. *See City of New Orleans* v. *Dukes*, 427 U.S. 297, 303-04 (1976); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 55 (1973); *Ferguson* v. *Skrupa*, 372 U.S. 726, 730-32 (1963). These well-recognized difficulties make it imperative that courts not rebuff a party's attempt to bring material and probative legislative facts to their attention. See Miller and Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 Va. L. Rev. 1187 (1975).

In this case, as preparations for the major prehearing conference began and the allotted period for discovery drew to a close, it became apparent that plaintiffs were not interested in exploring the question of health care provider practices. This lack of interest on their part was the more unusual since the

classes they represented were composed of the very people who could best inform the District Court of the relationship between their traditional practices and the statute's requirements.[26] To remedy this potential gap in the information available to the District Court, the defendants designed a questionnaire and compiled a representative sample of health care providers to survey concerning their parental consent requirements. 1 App. 287-92. By denying defendants' motion for leave to contact members of the plaintiff classes, the District Court precluded itself, and this Court, from developing an understanding of the relationship between the statute's provisions and existing health care provider practices. Defendants submit that this denial, given the importance of its effect upon the evidentiary record, amounts to an abuse of discretion which warrants reversal or remand.

III. The District Court Erred in Entertaining Plaintiffs' Facial Attack Against the Statute on the Grounds of Vagueness and Overbreadth.

During the third day of the first trial in this case, plaintiffs stipulated that they brought their challenge to the statute on its face and not as applied to the named plaintiffs before the court. 2 App. 213. The District Court accepted this stipulation and characterized plaintiffs' action as a facial attack in its first opinion. *Baird I* at 849, 850, n. 5, 857. However, plaintiffs' original class certification motion purported to include only mature minors within the scope of the class of minors represented, and the District Court certified the classes repre-

[26] The record of the original trial on this question was extremely limited, consisting primarily of the views of one or two individual practitioners. See *Baird I* at 854. Defendants believed that sound decision required a more scientific approach to the problem.

sented by Mary Moe I, Parents Aid Society, Inc., and Dr. Zupnick as requested. *Baird I* at 850-52. Specifically, the District Court determined that Mary Moe I (the only minor who testified at the first trial and who remains as a named plaintiff) was "fairly representative of a substantial class of unmarried minors in Massachusetts *who have adequate capacity to give a valid and informed consent*, and who do not wish to involve their parents . . . [emphasis supplied]." *Baird I* at 850.

During the course of the second trial, the defendants on several occasions sought to clarify the status of plaintiffs' claims, in particular whether they involved criticism of the statute based upon its inclusion of immature minors within its scope. The impetus for defendants' curiosity was plaintiffs' inclusion in their amended complaint of claims formulated in traditional facial overbreadth and vagueness terms, claims which, defendants presumed, were to be evaluated according to established criteria. Continuously unsuccessful in their pretrial efforts, defendants were finally able, in the closing moments of the second trial, to convince the District Court that the question of the status of immature minor claims required clarification. The court's interest prompted the dialogue excerpted and reproduced in the footnote and the exchange of correspondence, order of court, and formal response which are included in the appendix.[27] 1 App. 415-26. In their

[27] [191] Judge Aldrich: Judge Julian and I have been talking off the cuff. Are you contending that this statute is unconstitutional insofar as it applies to minors who are incapable of consenting?

Mr. Balliro: Yes.

Judge Aldrich: You are?

Mr. Balliro: Yes, we are.

Judge Julian: You did not so allege in the complaint. The complaint does not make any allegation with respect to anybody who is not a mature minor capable of understanding.

Mr. Balliro: I would respond by saying that we did not exclude that.

response to the District Court's order, the plaintiffs explicitly waived any claims against the statute based upon its inclusion of immature minors, 1 App. 426, and have taken the same position in writing in this Court. Plaintiffs-appellees' Memorandum in Support of Their Motion to Strike the Appearance of Counsel for Planned Parenthood League of Massachusetts, et al., at 5.[28] The result of plaintiffs' actions was to confine their claims before the District Court and now in this Court to those of mature minors. It is solely as to this group then, presumably composed entirely of adolescents, that the propriety of plaintiffs' facial attack should be evaluated.

JUDGE JULIAN: You did not include it. You are the plaintiff who makes the allegation.

[192] JUDGE ALDRICH: Would you give us a rough idea what argument you would make with respect to a minor who everybody would agree was not mature enough to consent?

MR. BALLIRO: I am not sure I would, Your Honor, upon considered reflection after listening to all the evidence. I merely do not want to waive that at this point, that's all.

JUDGE ALDRICH: That is a fair enough proposition, but I think you and your brethren ought to have an understanding with respect to that so that we will know what ball field we are playing on.

The discussion of this issue continues at some length in the transcript. 2 App. 473-86.

[28] Despite this unequivocal record, the District Court nevertheless asserted that plaintiffs could not waive the claims of immature minors since doing so would be a breach of their duty "as representatives of the classes that at least Dr. Zupnick purported to represent . . .," *Baird III* at 1001, n. 6. Purported representation, unaccompanied by actual evidence and argument and waived explicitly prior to decision, is too slender a reed to support such a significant burden.

The District Court may also have concluded that the statute was unconstitutional as to immature minors as well as to those capable of making the abortion decision. See *Baird III* at 1001. However, if it did so, its decision was in spite of the lack of allegations and evidence concerning immature minors, the absence of immature minors from the certified class represented by Mary Moe I, and plaintiffs' explicit waiver. It also stands in opposition to

This Court established the general rule applicable to procedural facial attacks[29] on the basis of overbreadth or vagueness in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973), and noted that such proceedings are highly unusual because:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the Court. [Citations omitted.] A closely related principle is that constitutional rights are personal and may not be asserted vicariously. [Citation omitted.]

Yet the situation in this case is more at war with these traditional principles than was the situation in *Broadrick*. *Broadrick* prohibits, in effect, the assertion of *jus tertii* possessed by absent plaintiffs by present plaintiffs who do not possess those rights. Here, by contrast, the District Court permitted present plaintiffs (mature minors) who *arguendo* possessed certain rights to assert *jus tertii* of absent plaintiffs (immature

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this Court's views in *Planned Parenthood*. See *id.* at 104 (Stevens, J., dissenting, "[c]ourt assumes that parental consent is an appropriate requirement if the minor is not capable of understanding the procedure . . .").

[29] Appellants distinguish for analytical purposes between procedural facial attacks which involve consideration of the rights of persons not before the court, the classic form of facial attack in the First Amendment area, and substantive facial attacks, i.e., those in which plaintiffs assert on their own behalf that the unconstitutionality of a statute may be determined by comparing it with substantive constitutional principles. In the District Court, differentiating between these two types of facial attacks and determining which type plaintiffs were pressing proved a difficult task. 2 App. 471-86.

minors) whose claims, if any, are quite attenuated and different from those of the plaintiffs before the court. See note 28, above.

Despite *Broadrick's* admonitions, the District Court appears to have considered plaintiffs' facial attack as a procedural one, at least in part, and its conclusions concerning overbreadth are erroneous for three reasons. First, although the court considered the statute's "chilling effect," *Baird III* at 1004-05, it failed to recognize that this consideration is limited to cases involving First Amendment rights. *Young* v. *American Mini Theatres*, 427 U.S. 50, 59 (1976); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-13 (1973); *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). Since plaintiffs' claims involve no First Amendment issues, the District Court's acceptance of a procedural facial attack predicated upon the application of the "chilling effect" doctrine was erroneous.

Second, a procedural facial attack, necessarily involving the claims of absent individuals, should have been unavailable to the plaintiffs in this case (mature minors) who were both before the court and the only ones with significant constitutional claims. See note 28, above. Because the claims of the class of mature minors could have been satisfied by an adjudication of the constitutionality of the statute as it might be applied to them, the District Court should have refrained from deciding the constitutional issues on a broader basis or to a greater extent than the record required. *Street* v. *New York*, 394 U.S. 576, 581 (1969). Moreover, because First Amendment rights were not involved, and because a narrower means of resolving the controversy was available to the District Court, a facial attack upon the statute was improper. *Young* v. *American Mini Theatres*, 427 U.S. 50, 60 (1976); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-13 (1973); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 891-901 (1970).

Third, the District Court's determination that the statute violated the constitutional rights of immature minors was improper because the mature minors before the District Court had no standing to assert another *jus tertii* claim, that of the statute's non-severability. It is settled law that, where a statute has been held unconstitutional in other applications, a new plaintiff to whom the remainder of the statute has been applied is the proper party to claim that the statute is non-severable.[30] *United States* v. *Raines*, 362 U.S. 17, 23 (1960); *Butts* v. *Merchants & Miners Transportation Co.*, 230 U.S. 126 (1913); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599, 606-07 (1972).

The District Court's mistaken acceptance of a procedural facial attack upon the statute has had a substantial impact on the Commonwealth's attempt to provide protection to its youngest citizens. As the chart reproduced at page 67 demonstrates in diagrammatic form, the statute is valid in two-thirds of the situations[31] within its scope, i.e., the pregnancy of all minors, whether mature or immature, in the second or third trimester. *Roe* at 164; *but see Baird III* at 1001 (court stated that "minor's . . . need of an abortion without her parents' knowledge is not limited to the first trimester . . .," apparently suggesting that statute might not regulate the performance of second and third trimester abortion surgery). Similarly, there should be no question that the statute is constitutional with respect to immature minors in the first trimester. See note 28, above. The remaining one-sixth portion of the statute's scope, that which includes mature minors in the first tri-

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[30] "Successful facial attacks predicated upon inseparability seem to be a thing of the past." Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 849, n. 19 (1970).

[31] The chart does not purport to represent a quantification of the proportion of individuals who populate its categories or the distribution of the occurrence of abortions among them as the District Court, despite defendants' efforts, seemed to think. See *Baird III* at 1001.

mester, is the only aspect of its coverage which is subject to criticism and, within this portion, three-quarters of its component situations create no controversy.[32] Finally, and most significantly, the record establishes that physicians should expect only about ten per cent of the individuals in this situation to find parental consultation both "objectively contraindicated" and "subjectively contraindicated." 2 App. 338-43; 539-42. To invalidate a statute which the record demonstrates exhibits the opposite of "substantial overbreadth" highlights the sound reasons why this Court disfavors facial attacks. The District Court's failure to appreciate these reasons and apply them properly in this case warrants reversal of its judgment.

IV. A Conclusion that the Statute Contains Unconstitutional Requirements or is Capable of Unconstitutional Applications does Not Justify its Total Rejection, and the Court Would Further Legislative Intent by Permitting Enforcement of the Statute's Constitutional Provisions.

The Massachusetts General Court originally adopted the statute as § 12P in St. 1974, ch. 706. It acted against the background of this Court's recent ruling in *Roe* v. *Wade*, and the legislation's title, "An Act to protect unborn children and maternal health within present constitutional limits," reflected the Legislature's two-fold concern that it implement its policy judgments while observing constitutional restrictions. One of the methods which the Legislature chose to

[32] The statute obviously injures no minor who desires to consult her parents and, according to plaintiffs' expert witness, advances a desirable end when it requires physicians to obtain parental consent from those patients for whom consultation is "objectively indicated."

achieve its goals was to include an unusually precise severability clause in the act:

> If any section, subsection, sentence or clause of this act is held to be unconstitutional, such holding shall not affect the remaining portions of this act. St. 1974, ch. 706, § 2.

The Supreme Judicial Court, in its answers to the District Court's certified questions in *Attorney General*, not only noted the statute's unusual severability clause, but also expressed its intention that its construction of the statute should "conform" with this Court's *future* determinations of federal constitutional law:

> Our principal advice to the Federal District Court is that we would construe § 12[S] to preserve as much of the expressed legislative purpose as is constitutionally permissible. The fact that the Supreme Court has not yet defined the permissible scope, if any, of parental involvement in an unmarried minor's decision to seek an abortion makes certain of our constructions of § 12[S] potentially infirm. If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation. *Attorney General* at 100-01, 360 N.E. 2d at 292.

The statute's detailed severability clause and the Supreme Judicial Court's permissive and future-oriented expression of

its principles of construction are indeed unusual. However, they are also a reasonable reaction to the novelty of the constitutional principles which *Roe* announced. Moreover, they represent the combined efforts of the Commonwealth's legislative and judicial branches to fashion protective, constitutional legislation in a situation of unavoidable uncertainty. The District Court, unsympathetic to the state's difficulties and unwilling to acknowledge the error of *Baird I's* construction of the statute, see *Baird III* at 1004, rejected the Supreme Judicial Court's invitation to construe the statute to conform to constitutional requirements. It also refused to accept the alternative which defendants offered of enjoining only those requirements or applications which it concluded were incompatible with the Constitution. *Baird III* at 1005-06. Appellants argue in this section that the District Court abused its remedial powers by refusing to sever the statute's offending provisions, adopt a limiting construction, or enter an injunction no broader than required to vindicate its view of a minor's constitutional rights.[33]

The District Court's majority opinion relied upon this Court's decision in *United States* v. *Reese*, 92 U.S. 214, 221 (1875) (statute held unconstitutional which had both constitu-

[33] The District Court's willingness to strike the statute down in its entirety created the additional problem, closely related to those discussed in Argument Section III, above, that the parties before the Court had no right to request such broad relief. As this Court held in *Butts* v. *Merchants & Miners Transportation Co.*, 230 U.S. 126 (1913), where a statute has been declared unconstitutional in other applications, a new plaintiff to whom the remainder of the statute has been applied is the proper party to contend that the statute is non-severable and therefore cannot be enforced against him. This rule, consistent with traditional standing principles, should have precluded the District Court from granting any broader relief than was necessary to protect the rights of those before it. *See United States* v. *Raines*, 362 U.S. 17, 23 (1960); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599, 606-07 (1972).

tionally permissible and impermissible applications), to justify its refusal to sever the unconstitutional parts of the statute from those which had not been challenged or which were clearly constitutional.[34] *Baird III* at 1005-06. *Reese*, however, states an inapplicable exception to the severability rule which this Court has generally applied in recent years.[35] Under the modern rule, a statute need not be constitutional in all its possible applications in order to withstand a constitutionally based facial attack. *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971) (upholding facial constitutionality of statute, found constitutional as applied to the facts of the case, while recognizing there might be unconstitutional applications of same section to other facts); *United States* v. *Raines*, 362 U.S. 17, 20-24 (1960) (same); *see Dorchy* v. *Kansas*, 264 U.S. 286, 289-90 (1924); Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76, 82-102 (1937). As a result of these cases, the *Reese* rule now appears to be limited to situations in which "a criminal statute would necessitate such a revision of its text as to create a situation in which the statute no longer gave an intelligible warning of the conduct it prohibited." *United States* v *Raines*, 362 U.S. 17, 22 (1960) (citing *Reese* and limiting its application). Indeed, one member of the District Court's majority, while refusing to adopt a limiting construction to save the statute in this case,

[34] For reasons previously discussed, see Argument Section III, above, there should be no question that the statute is constitutional with respect to all minors, mature or immature, in the second or third trimesters. *Roe* at 164. Similarly, there should be no question that the statute is constitutional with respect to immature minors in the first trimester. See note 28, above.

[35] The District Court appears to rely on a supposed distinction between severance of language and severance of application in refusing to save any part of the statute. *Baird III* at 1005, n. 10. The District Court's reliance upon *Reese* in this regard is also misplaced. *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971); *United States* v. *Raines*, 362 U.S. 17, 20-24 (1960) (discussed further in the text).

elsewhere joined in an opinion which acknowledges the general rule which appellants urge here:

> The general rule on separability, when part of a statute *or some of its applications* are declared to be constitutionally invalid is that the rest of the statute shall stand intact if the valid provisions *or applications* are capable of being given effect standing alone, and *if the Legislature would have intended* the statutes to stand with the invalid provisions stricken out . . . [emphasis supplied]. *Baird* v. *Davoren*, 346 F. Supp. 515, 522 (D. Mass. 1972) (Murray, D.J., joined by Aldrich, C.J., and Julian, D.J.).

The Supreme Judicial Court's opinion in *Attorney General* makes it clear that the statute is amenable to limiting constructions designed to conform its requirements to constitutional norms. First, as appellants suggested to the District Court, the statute could be construed as inapplicable to mature minors in the first trimester. *Attorney General* at 106, 111-12, 360 N.E. 2d at 294, 297. Second, the scope of the statute's judicial superintendence provision, as embellished by the Supreme Judicial Court, could be held inapplicable to mature minors, as the dissenting judge in the District Court suggested. *Baird III* at 1015-20 (Julian, J., dissenting); *Attorney General* at 106-07, 111-12, 360 N.E. 2d at 294, 297. Third and finally, the uniform requirement of parental consultation, again as interpreted by the Supreme Judicial Court, could be construed as not encompassing situations in which a judge, invoking traditional principles of equity jurisdiction, determines that consultation would be harmful. *Attorney General* at 112, 360 N.E. 2d at 297. The choice of any or all of these alternatives would at once alleviate perceived constitutional difficulties as

well as avoid the *Reese* proscription against severing statutory provisions in such a way that the remainder no longer provides intelligible warning of prohibited conduct.

The Supreme Judicial Court's opinion in *Attorney General* also makes it clear that further interpretation of the statute by the federal courts would be consistent with its and the Legislature's wishes. Judicial reluctance to construe statutes in order to save them from possible constitutional defects appears in general to be based upon two considerations: first, a concern that constructions involving consideration of legislative fact may be prone to error since courts lack the fact-finding apparatus available to legislatures; and, second, a respect for the legislative process which prompts a desire to avoid judicial constructions which frustrate legislative intent. Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 893-97 (1970). Neither of these two considerations applies in the present case.

First, the limiting constructions which appellants suggest are not likely to suffer from the type of error which results from the lack of legislative fact-finding apparatus. The evidentiary record in this case, consisting primarily of legislative fact, is fairly extensive and supports the soundness of the suggested constructions. See 2 App. 490-611; 1 App. 177-213; 221-23; 226-33; 248-50; 252-65; 270-71; 273-75. Additionally, the distinctions upon which the constructions are based are tied to decisional law (the first trimester exception of *Roe* v. *Wade* and the limited mature minor rule which the Supreme Judicial Court adopted in *Attorney General* for areas other than abortion).

Second, both the Commonwealth's Legislature and its Supreme Judicial Court have expressed the expectation that the federal courts will construe the statute to the maximum extent possible to save as much of it as possible. The sufficiency of such an expression of legislative and judicial intent as

justification for the adoption of the limiting constructions which appellants propose was endorsed by a dissent in *Planned Parenthood*:

> The question whether a constitutional provision of state law is severable from an unconstitutional provision is *entirely* a question of the intent of the state legislature. *Planned Parenthood* at 100 (White, J., dissenting, in an opinion in which the Chief Justice and Justice Rehnquist joined) (emphasis in original).

Besides its misplaced reliance on *Reese*, the District Court's opinion offers no accepted reason for refusing defendants' request that it construe the statute in a manner which preserves its constitutionality or enter an injunction narrowly drawn to prevent its unconstitutional application. Rather, the court seems determined to prevent the statute's survival and to chastise the Legislature and the Supreme Judicial Court. *Baird III* at 999, 1005. Such stubbornness, based upon an inverted application of the principles of statutory interpretation and without justification in the policies underlying judicial deference to legislative enactments, does not deserve this Court's endorsement. Rather, if the Court concludes that the statute contains invalid provisions or is capable of unconstitutional applications, it should accept the invitation of both the Massachusetts Legislature and its Supreme Judicial Court to construe it so that it achieves its protective objectives "within present constitutional limits."

V. The District Court Lacks Authority to Alter this Court's Order Concerning the Award of Costs in Bellotti I.

On August 2, 1976, this Court entered an order pursuant to Rule 57(2) awarding Clerk's costs to the appellants and dividing the costs of printing the record in *Bellotti I* between appellants and appellees.[36] The District Court, in the closing paragraph of its opinion and without making any findings or citing authority, ordered that "Plaintiffs are entitled to costs, including recovery of costs paid as a result of the previous appeal, lost because of defendants' mistaken advocacy." *Baird III* at 1006. This statement, unwarranted by any rule or decision of this Court, Sup. Ct. Rule 57(2), 28 U.S.C. App. (1976); *Bradstreet* v. *Potter*, 41 U.S. (16 Peters) 317 (1842) (stating the rule now codified in Rule 57); *see Broffe* v. *Horton*, 173 F. 2d 565 (2d Cir. 1949) (citing precursor of Rule 57 and refusing to allow "costs [to] abide the event"), is also unjustified by any traditional basis for imposing costs as a penalty for improper conduct. Indeed, it is hard to divine any justification for it.

This case is over four years old. Commenced against a prior Attorney General of the Commonwealth in 1974, appealed to this Court in 1975 and argued and decided in 1976, heard in the Supreme Judicial Court on certified questions later that year, and retried in the District Court in 1977, it reaches this

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[36] The order provides that:

> . . . it is ordered and adjudged by this Court that the judgment of the United States District Court in these causes be, and the same is hereby, vacated, with one half of the total costs of printing the record and the Clerk's costs to be taxed against appellees therein. . . .
>
> It is further order that the said appellants Francis X. Bellotti, Attorney General of Massachusetts, et al., in No. 75-73, recover from William Baird, et al., Three Thousand Three Hundred and Fifty-two Dollars and Eighty [cents] . . . for their costs herein expended.

Court on a substantial record and brings fundamental questions for decision. Since the current Attorney General assumed responsibility for the litigation, appellants have offered arguments in the statute's defense which, in large measure, both this Court and the Supreme Judicial Court have found convincing.[37] Further, at no point have appellants acted other than in discharge of their responsibilities under the statutes of the Commonwealth. Mass. Gen. Laws Ann. ch. 12, § 3 (West 1976) (Attorney General to defend actions on behalf of the Commonwealth); *Feeney* v. *Commonwealth*, Mass. Adv. Sh. (1977) 1959, 1964-65, 366 N.E. 2d 1262, 1265 (1977) (ch. 12, § 3, consolidates responsibility for all legal matters involving the Commonwealth in the office of the Attorney General).

On this record one looks in vain for the "mistaken advocacy" to which the District Court referred. Certainly the "mistake" cannot be one of determining to mount a defense, for the statute is defensible. *See Bellotti I* at 147; *Planned Parenthood* at 75. And certainly it cannot be the difference between defendants' view of the statute's provisions and that of the Supreme Judicial Court, for the views are so similar.[38] And certainly it cannot be a reference to the District Court's ultimate disagreement with defendants' arguments, for this

[37] Perhaps most significant among these is the defendants' position that the statute should be interpreted as a protective legislative act designed to advance the best interests of adolescents and children through reliance upon traditional social institutions rather than, as plaintiffs argued and the District Court determined, an enactment vesting parents with an arbitrary veto over their child's abortion decision. *Bellotti I* at 143-47; *Baird I* at 856; *Attorney General* at 102-03, 360 N.E. 2d at 292-93; *but see Baird III* at 1004.

[38] The District Court often refers to "defendants' mistaken assumptions," the "radically different" nature of the statute as defendants viewed it and the Supreme Judicial Court construed it, and their "singular" or "peculiarly incorrect, and inappropriate" arguments. Appellants regard this use of language as poetic rather than, as its literal interpretation would suggest, attributive of bad faith.

issue, as the court itself recognized, *see Baird III* at 1006, must await this Court's judgment.

Appellants submit that there is no justification in law or established principles of judicial discretion for the District Court's order altering this Court's order of August 2, 1976. Therefore, its judgment in this regard should be vacated and this Court's order reaffirmed.

Conclusion

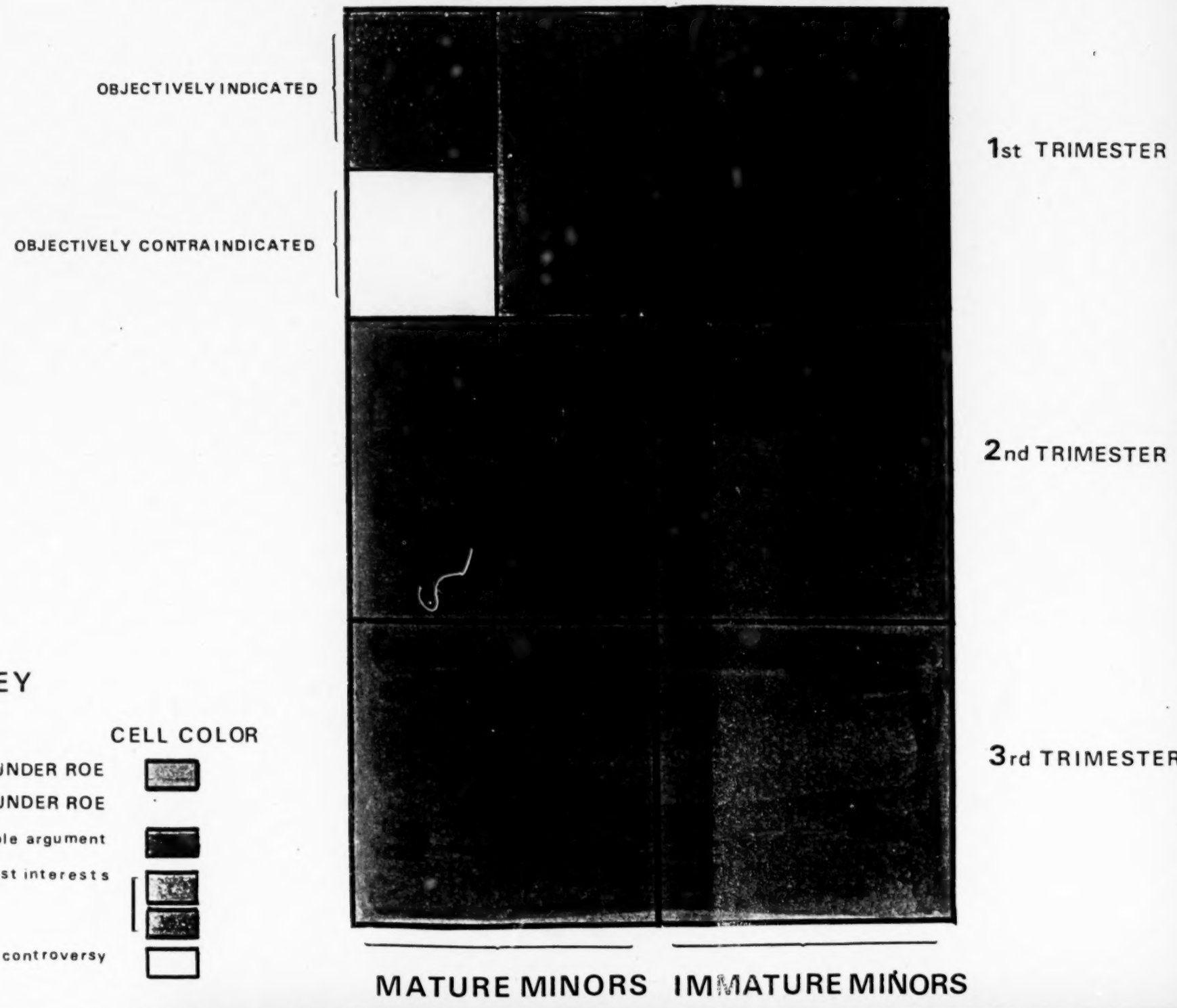
For the reasons discussed, the Court should reverse the District Court's judgment and enter judgment determining that the statute is constitutional and reaffirming its previous order concerning the division of costs incurred in *Bellotti I*.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General
GARRICK F. COLE
MICHAEL B. MEYER
THOMAS R. KILEY
Assistant Attorneys General
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108

Date: December 14, 1978

Addendum.


SUBJECTIVELY CONTRAINDICATED
SUBJECTIVELY INDICATED
OBJECTIVELY INDICATED
OBJECTIVELY CONTRAINDICATED
1st TRIMESTER
2nd TRIMESTER
3rd TRIMESTER
MATURE MINORS
IMMATURE MINORS
KEY
STATUS
CELL COLOR
VALID UNDER ROE
CONTROVERSIAL UNDER ROE
No credible argument
Consistent with best interests
Legitimate controversy

Supreme Court, U. S.
FILED
DEC 14 1978
JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

Nos. 78-329, 78-330.

JANE HUNERWADEL,
APPELLANT IN 78-330,
FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS IN 78-329,
v.
WILLIAM BAIRD ET AL.,
APPELLEES IN NOS. 78-329 AND 78-330.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Brief of the Defendant-Intervenor Jane Hunerwadel.

BRIAN A. RILEY,
Suite 520,
40 Court Street,
Boston, Massachusetts 02108.
(617) 523-3240
Attorney for Intervenor.

Of Counsel:
THOMAS P. RUSSELL,
Suite 520,
40 Court Street,
Boston, Massachusetts 02108.
(617) 523-3240

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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In the
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OCTOBER TERM, 1978.

Nos. 78-329, 78-330.

JANE HUNERWADEL,
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WILLIAM BAIRD ET AL.,
APPELLEES IN NOS. 78-329 AND 78-330.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Brief of the Defendant-Intervenor Jane Hunerwadel.

This brief is submitted on behalf of Jane Hunerwadel, who was allowed to intervene in the District Court as representative of a class of parents having unmarried, minor girls who are or might become pregnant.

Opinions Below.

This is the second time that the Court has been required to review the constitutionality of the statute in question. The first decision of the District Court was issued by a divided court on April 28, 1975, and is reported at 393 F. Supp. 847 (D. Mass. 1975). On July 1, 1976, in a decision reported at 428 U.S. 132 (1976), this Court unanimously vacated the order of the District Court and remanded the case so that questions could be certified to the Supreme Judicial Court of the Commonwealth of Massachusetts, concerning the interpretation of the statute in question. On January 25, 1977, the Supreme Judicial Court issued an opinion which is reported at Mass. Adv. Sh. (1977) 96, and 360 N.E. 2d 288 (1977), answering nine questions which had been previously certified by the District Court. On February 10, 1977, the District Court issued a divided opinion, reported at 428 F. Supp. 854 (D. Mass. 1977), enjoining enforcement of the statute as interpreted by the Supreme Judicial Court. After hearing further evidence, the District Court issued another divided opinion on May 2, 1978, permanently enjoining enforcement of the statute. This opinion is reported at 450 F. Supp. 997 (D. Mass.1978).

Jurisdiction.

This action for declaratory and injunctive relief was brought by the appellees under the provisions of 28 U.S.C. §§ 1331, 1343, 2201 and 42 U.S.C. § 1983 (App. I, 75). A three-judge court was convened pursuant to 28 U.S.C.

§§ 2281, 2284[1] (App. I, 2). The order of the District Court was entered on May 2, 1978 (App. I, 64-65). An amended order correcting a clerical error in the original order was entered on June 20, 1978. The intervenor filed her notice of appeal in the District Court on June 26, 1978 (App. I, 70). She filed her jurisdictional statement on August 25, 1978. On October 30, 1978, the Court noted probable jurisdiction and consolidated this appeal with the appeal filed by Attorney General Francis X. Bellotti in No. 78-329. The jurisdiction of this Court to review the order of the District Court is conferred by 28 U.S.C. § 1253.

Statutes Involved.

The District Court order declared § 12S of chapter 112 of the Massachusetts General Laws unconstitutional. Except for being renumbered from § 12P to § 12S in 1977, this is the same statute that was before the Court in *Bellotti* v. *Baird*, 428 U.S. 132 (1976). The District Court also declared unconstitutional all other sections of chapter 112 insofar as they make specific reference to § 12S. These sections, which are set forth below together with § 12S, are §§ 12Q, 12T and 12U.[2]

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[1] The repeal of 28 U.S.C. § 2281 and the amendments to 28 U.S.C. § 2284 do not affect this appeal. See § 7 of the Act of August 12, 1976, P.L. 94-381, 90 Stat. 1120, providing: "This Act [repeal of 28 U.S.C. § 2281 and amendments to 28 U.S.C. § 2284] shall not apply to any action commenced on or before the date of enactment [enacted August 12, 1976]." This action was commenced on October 30, 1974 (App. I, 1).

[2] These sections were added as part of a comprehensive act to regulate abortions in the Commonwealth of Massachusetts. See Mass. St. 1974, c. 706. These sections were renumbered by Mass. St. 1977, c. 377, with certain corrective changes but no change in language. As a result, § 12N became § 12Q, § 12P became § 12S, § 12Q became § 12T and § 12R became

§ 12Q. Except in an emergency requiring immediate action, no abortion may be performed under sections twelve L[3] or twelve M[4] unless the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section twelve S; and if the abortion is during or after the thirteenth week of pregnancy, it is performed in a hospital duly authorized to provide facilities for general surgery.

Except in an emergency requiring immediate action, no abortion may be performed under section twelve M unless performed in a hospital duly authorized to provide facilities for obstetrical services.

§ 12S. If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent

§ 12U. These and other sections had to be renumbered because the Legislature had inadvertently assigned the same section numbers to different statutes. See *Bellotti* v. *Baird*, 428 U.S. at 134, n. 1.

[3]Section 12L is concerned with abortions performed prior to the twenty-fourth week of gestation. It requires such abortions to be performed by a physician and only if in his best medical judgment the abortion is necessary under all attendant circumstances.

[4]Section 12M is concerned with abortions performed after the twenty-fourth week of gestation. It prohibits physicians from performing an abortion after twenty-four weeks gestation except where it is necessary to save the life of the mother or would cause a substantial risk to the mother's physical or mental health.

is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve U.

§ 12T. Any person who commits an act in violation of sections twelve O[5] or twelve P[6] shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars, or by imprisonment of not less than three months nor more than five years, or by both said fine and imprisonment. Conduct which violates sections twelve O or twelve P which also violates any other criminal laws of the commonwealth, may be punished either under this section or under such other applicable criminal laws. Any person who willfully violates the provisions of sections twelve Q or twelve R[7] shall be pun-

[5]Section 12O imposes certain obligations on a physician who performs an abortion after 24 weeks of gestation under § 12M. It prohibits a physician using any abortion procedure designed to destroy the life of the unborn child unless in his best medical judgment other procedures would create a risk of death or serious bodily injury to the mother.

[6]Section 12P requires physicians to take reasonable steps to preserve the life and health of the aborted child when performing an abortion under § 12M.

[7]Section 12R sets forth certain filing requirements for physicians performing abortions and other matters relating to the collection of statistical information.

ished by a fine of not less than one hundred dollars nor more than two thousand dollars.

§ 12U. The attorney general or any person whose consent is required either pursuant to section twelve S or under common law, may petition for superior court for an order enjoining the performance of any abortion that may be performed contrary to the provisions of section twelve I to twelve T, inclusive.

Question Presented.

Whether Mass. G.L. c. 112, § 12S, prohibiting physicians from performing abortions on unmarried, minor girls under the age of eighteen without parental consent or the consent of a judge of the Superior Court is unconstitutional on its face under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Statement of the Case.

I. The First Trial in the District Court.

The plaintiffs commenced this class action for declaratory and injunctive relief on October 30, 1974 (App. I, 2), just one day before § 12S was to take effect. The following day District Court Judge Frank H. Freedman issued a temporary restraining order enjoining enforcement of the statute pending a hearing by the court (App. I, 2).

The plaintiffs are Mary Moe, a fictitious name for a sixteen-year-old minor, unmarried girl, living at home with her

parents, who at the time of this action desired to have an abortion without informing her parents[8] (App. I, 78); Parents Aid Society (hereinafter Parents Aid), an abortion clinic (App. I, 79-80); William Baird, director of Parents Aid (App. I, 77-78); and Gerald Zupnick, M.D., a physician paid to perform abortions at Parents Aid[9] (App. I, 77-78; II, 176-77). The defendants are Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts, and the District Attorneys for all the

[8] Mary Moe's testimony was impounded during the first trial and therefore was not included in the appendix. Neither the defendants, the intervenor, nor their attorneys know her true identity (Tr. 171). At the time this action was brought, she alleged by way of affidavit that she was about nine weeks pregnant and desired to have an abortion without informing her parents. Within several hours after the temporary restraining order was entered, Dr. Zupnick performed an abortion on Mary Moe at the abortion center operated by Parents Aid (Tr. 139, 142). Her parents were neither joined as parties to the action nor were they informed of the abortion. The court has refused to appoint a guardian to act in her behalf. *Baird I* at 850, n. 5. Mary Moe testified at trial, in camera, that although she had a close relationship with her parents and that her parents loved her and were concerned for her welfare (Tr. 149), she wanted the abortion because she felt that if her parents learned of her pregnancy, they would get upset and might take some action against the boy who made her pregnant (Tr. 162).

[9] Gerald Zupnick describes himself as a "contract physician" (App. II, 156). He performs abortions at centers operated by Parents Aid in both Boston and New York (App. II, 205). He is the only physician who performs abortions at Parents Aid in Boston (App. II, 160). He resides in New York and travels to Boston two days a week to perform abortions (App. II, 182). He is not affiliated with any hospital (App. II, 224). Although he occasionally sees other patients, the sole source of his medical income is from abortions performed at Parents Aid (App. II, 194). Dr. Zupnick is compensated by Parents Aid on the basis of a fee-splitting arrangement whereby he receives one-third of the fee paid for each abortion he performs (App. II, 176). At the time of the trial, his most recent check from Parents Aid in Boston for two days' work amounted to $600 (App. II, 177). He has received as much as $900 for a similar period (App. II, 205). Normally, he does not participate in the pre-abortion decision-making process (App. II, 159) and spends on the average a total of 5 to 7 minutes with each girl (App. II, 186-87). He does not require parental consent for minors who seek abortions and who do not desire to inform their parents (App. II, 190).

counties in the Commonwealth (App. I, 85). Jane Hunderwadel, who is the mother of three unmarried, minor girls, was permitted to intervene as a defendant and as representative of a class of Massachusetts parents having minor, unmarried daughters who are or might become pregnant (App. I, 5).

After a three-judge court was convened, the hearing on the preliminary injunction was merged with the hearing on the merits (App. I, 7). On December 9, 30 and 31, 1974, and January 28, 1975, the plaintiffs and defendants presented evidence including expert testimony on the medical, psychological and social problems associated with teenage pregnancies and abortions. During trial plaintiffs stipulated that they were challenging the statute only on its face and not as applied (App. II, 214). On April 28, 1975, the District Court issued a divided opinion declaring § 12S, and all other sections of chapter 112, insofar as they make specific reference thereto, unconstitutional (App. I, 13-14). An order was entered permanently enjoining enforcement of the statute. The majority indicated that the primary fault with the statute was that parents were "granted individual rights independent of the minor's best interests." *Baird* v. *Bellotti*, 393 F. Supp. 847, 857 (D. Mass. 1975) (*Baird I*). A lengthy dissent was filed by Senior District Judge Anthony J. Julian.

II. The First Appeal.

On July 1, 1976, this Court held that the statute was susceptible to an interpretation which "would avoid or substantially modify the federal constitutional challenge to the statute." *Bellotti* v. *Baird*, 428 U.S. 132, 148 (1976). The Court vacated the decision of the District Court on the ground that it "should have abstained pending construction of the statute by the Massachusetts courts," 428 U.S. at 146, and further held

that "the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of [§ 12S] and the procedure it imposes." 428 U.S. at 151. On remand, the District Court denied plaintiffs' application for stay of enforcement pending certification of questions to the Supreme Judicial Court.[10] However, on July 20, 1976, a single justice of this Court (Brennan, J.) granted a stay of enforcement. The Court later denied intervenor's application to vacate the stay. 429 U.S. 892 (1976).

III. Questions Certified to the Supreme Judicial Court.

On August 31, 1976, the District Court certified nine questions to the Supreme Judicial Court (App. I, 22, 23). The questions were concerned with the standards to be applied by the Superior Court in determining "good cause" and whether parental consultation was required in all cases. Other questions dealt with the appointment of counsel, criminal liability for physicians and the relationship of § 12S to other statutes dealing with medical treatment of minors.

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[10] When the Court remanded the case to the District Court it seemed fairly clear that Court intended that the statute would go into effect. In *Bellotti* v. *Baird*, 428 U.S. at 151, the Court stated:

> The importance of speed in resolution of the instant litigation is manifest. *Each day the statute is in effect*, irretrievable events, with substantial personal consequences, occur. Although we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis. Further, in light of our disapproval of a "parental veto" today in [*Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976)], we must assume that the lower Massachusetts courts, if called upon to enforce the statute pending interpretation by the Supreme Judicial Court, will not impose the most serious barrier. (Emphasis added.)

On January 25, 1977, in *Baird* v. *Attorney General*, ____ Mass. ____, 360 N.E. 2d 288 (1977), the Supreme Judicial Court issued a comprehensive opinion answering all of the questions asked by the District Court. While not deciding the constitutional questions posed by the case, the court made every effort to interpret the statute in a manner consistent with the Constitution so as to give full effect to the announced legislative intent embodied in the title of the statute when it was initially enacted, i.e., "An Act to protect unborn children and maternal health within present constitutional limits." 360 N.E. 2d at 290; see Mass. St. 1974, c. 706, which added § 12S together with several other sections of the law. In so doing, the Supreme Judicial Court took specific note of the broad savings clause in Mass. St. 1974, c. 706, § 2, which provides that "[i]f any section, subsection, sentence or clause of this act is held to be unconstitutional, such holding shall not affect the remaining portions of this act." 360 N.E. 2d at 291. Based upon this analysis, the Supreme Judicial Court prefaced its answers to the questions with the following statement:

> Our principal advice to the Federal District Court is that we would construe [§ 12S] to preserve as much of the expressed legislative purpose as is constitutionally permissible. The fact that the Supreme Court has not yet defined the permissible scope, if any, of parental involvement in an unmarried minor's decision to seek an abortion makes certain of our constructions of [§ 12S] potentially infirm. If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principal that we would have construed the statute to conform to that interpretation. 360 N.E. 2d at 292.

After reviewing each question in detail, the Supreme Judicial Court summarized its answers to the nine questions as follows:

> Parental consultation is required in every instance where an unmarried minor seeks a nonemergency abortion. If the minor's parents (or their equivalent) are unavailable, parental consultation is not required. In deciding whether to consent to an abortion for their unmarried minor daughter, parents should consider only her best interests. If one or both parents refuse consent, a judge of the Superior Court may authorize an abortion for an unmarried minor if he rules that an abortion is in the minor's best interests. The parents, if available, must be notified of the court proceeding and must be allowed to participate in it. The judge in his discretion may appoint counsel or a guardian ad litem for the minor in the court proceeding. The court proceeding must be handled expeditiously. 360 N.E. 2d at 303.

IV. Further Hearings in the District Court.

After the District Court received the answers to the certified questions, the plaintiffs filed an amended complaint seeking preliminary and permanent injunctive relief enjoining enforcement of the statute as interpreted by the Supreme Judicial Court (App. I, 25). On February 10, 1977, after hearing arguments, a majority of the District Court granted a preliminary injunction enjoining enforcement of the statute (App. I, 27). Senior District Judge Anthony J. Julian again dissented. See *Baird* v. *Bellotti*, 428 F. Supp. 854 (D. Mass. 1977) (*Baird II*).

V. The Second Trial in the District Court.

During the period between February, 1977, and August, 1977, numerous motions were filed on matters relating to a further hearing before the District Court. These motions related primarily to discovery. Interrogatories and requests for admissions were made by the various parties (App. I, 30-50). After a pretrial conference on August 22, 1977, two more days of trial were held on October 17 and 18, 1977, when both parties presented more expert testimony to the court (App. I, 56).

On May 2, 1978, in *Baird* v. *Bellotti*, 450 F. Supp. 997 (D. Mass. 1978) (*Baird III*), the District Court issued the decision which is the subject matter of this appeal. In *Baird III* a majority of the court held that § 12S was unconstitutional for basically two reasons. First, the majority felt that the statute was unconstitutional because it required parental consultation in all cases where an unmarried, minor girl sought an abortion. 450 F. Supp. at 1000-1003. The second reason given by the majority was that the statute discriminated against so-called mature minor girls capable of giving an informed consent who under the statute could potentially be denied an abortion upon a finding by a Superior Court judge that an abortion would not be in their best interests. 450 F. Supp. at 1003-1004. The majority felt this was an "undue burden in the due process sense, and a discriminatory denial of equal protection." 450 F. Supp. at 1004. In reaching this decision, the majority rejected the Supreme Judicial Court's suggestion that the statute should be construed in a manner consistent with the Constitution. 450 F. Supp. at 1005-1006. Senior District Judge Anthony J. Julian again dissented. He felt that the requirement of parental consultation in all cases was proper. However, he agreed with the majority insofar as they held that the statute was invalid because it discriminated against

mature minors capable of giving an informed consent. 450 F. Supp. at 1015. But rather than voiding the entire statute, Judge Julian stated that he "would strike the provision for judicial override and would limit the judge's role to a determination of whether the minor is capable of making the decision and whether her decision to have an abortion is informed and reasonable." 450 F. Supp. at 1015.

After the District Court issued its order enjoining enforcement of the statute, the court granted a motion to intervene filed on behalf of Planned Parenthood League of Massachusetts, the Crittenton Hastings House and Clinic and Philip G. Stubblefield (App. I, 69).

Argument.

I. The Statute is Constitutional on its Face.

A. *The Statute Reflects the Well Settled Principle that Parents Have the Primary Right and Duty to Guide and Protect their Minor Children.*

There is nothing more fundamental to our constitutional form of government than the institution of the family. It is on the family that all other social relationships depend. The family is the cornerstone of our society. Our political institutions are based upon a social system of family units, not isolated individuals. It is upon this system of family units that we rely for an orderly and cooperative interdependent society.[11] See Hafen, *Children's Liberation and the New*

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[11] See *Doe* v. *Irwin*, 441 F. Supp. 1247, 1249 (W.D. Mich. 1977), stating:

> Our political system is superimposed on and presupposes a social system of family units, not just of isolated individuals. No assumption

Egalitarianism: Some Reservations About Abandoning Youth to their "Rights," 1976 Brigham Young U. L. Rev. 604, 615-617.

In order to support the fundamental role of families, the law has imposed upon parents certain correlative rights and duties. Along with the duty to support, educate and maintain their minor children, parents have been accorded the correlative right to care for, guide and protect their minor children until the age of majority.

This Court has frequently held that the right and obligation of parents to guide and protect their minor children is a right protected by our Constitution. In *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), the Court noted that the right to liberty guaranteed by the Fourteenth Amendment includes the right "to marry, establish a home and bring up a family." Two years later, in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the Court reaffirmed the liberty of parents to direct the upbringing of their children by holding that parents have the right to choose whether their children will be educated in a private or public school. In *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972), the Court stated: "The history and culture of

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> more deeply underlies our society than the assumption that it is the individual [parent] who decides whether to raise a family, with whom to raise a family, and, in broad measure, what values and beliefs to inculcate in the children who will later exercise rights and responsibilities of citizens and heads of families. . . .
>
> . . . [T]he family unit does not simply co-exist with our constitutional system; it is an integral part of it. In democratic theory as well as in practice, it is in the family that children are expected to learn the values and beliefs that democratic institutions later draw on to determine group directions. The immensely important power of deciding about matters of early socialization has been allocated to the family, not to the government.

Quoting Hafen, at 617, cited in text, *supra*.

Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition." See also *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 843-844 (1977); *Moore* v. *East Cleveland*, 431 U.S. 494, 503-504 (1977); *Roe* v. *Wade*, 410 U.S. 113, 152-153 (1973); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). The intervenor recognizes, however, that the right of parents to rear their children is not absolute and that the state may regulate the family in the best interests of minor children. See *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (state may enact child labor laws). But, as the Court stated in *Prince*, "[i]t is cardinal . . . that the care, custody and control of [children] reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166.

The Massachusetts statute in question is in accord with this body of law. Consistent with these cases, the statute requires the minor girl to seek the consent of her parents before obtaining an abortion. In so doing, the statute insures that the minor girl consults with her parents so that they have the opportunity to fulfill their obligation to provide guidance and assistance to their child during a most difficult time in her life. If the parents refuse to grant consent to the abortion, the statute provides a mechanism for a judge of the Superior Court to determine whether or not an abortion is in the best interests of the child. This statutory scheme is parallel to the approach taken by the Court in *Prince*.

B. *The Statute does Not Infringe upon a Minor's Right to Obtain an Abortion.*

In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), this Court, by a vote of five-to-four, held that a state could not enact a statute which required a minor girl to obtain parental consent as an absolute prerequisite for obtaining an abortion. In so doing, Justice Blackmun, joined by Justice Brennan and Justice Marshall, noted that the Court's decision should "not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." 428 U.S. at 75. The Court further stated that the fault with such a statute "is that it imposes a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without sufficient justification." 428 U.S. at 75.

The key to the *Planned Parenthood* decision is found in the concurring opinion of Justice Stewart, joined by Justice Powell, which made it clear that a statute requiring parental consultation would be constitutionally permissible. Justice Stewart stated:

> With respect to the state law's requirement of parental consent, § 3(4), I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Bellotti* v. *Baird*, 428 U.S. 132, 147-148, suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to

> give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.
>
> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place. 428 U.S. at 90-91. (Footnotes omitted.)

Justice White, joined by the Chief Justice and Justice Rehnquist, dissented and indicated that, in their opinion, the parental consent provision contained in the Missouri statute was constitutional. Justice White stated:

> The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children from their own immature and improvident decisions; and there is absolutely no reason expressed by the majority why the State may not utilize that method here. 428 U.S. at 95.

Justice Stevens, who also dissented, stated:

> A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision. 428 U.S. at 104.

The intervenor contends that the Massachusetts statute, as interpreted by the Supreme Judicial Court, is constitutional under *Planned Parenthood*. The statute does not give parents an unbridled veto, but rather insures that parents are given the opportunity to consult with their minor daughter in the event that she becomes pregnant. The statute insures that any disagreement between the minor girl and her parents will be resolved in an expeditious manner before a judge of the Superior Court. It further provides that the court must grant consent if the abortion is in the minor's best interests. See *Baird* v. *Attorney General*, 360 N.E. 2d at 293.

C. *The Statute Serves Rational as Well as Compelling State Interests.*

The intervenor contends that the Massachusetts statute must be upheld as long as it is rationally related to a valid state interest. "[T]he relevant question in any case where state laws infringe upon the freedom of action of young people in sexual matters is whether the restriction rationally serves valid state interests." *Carey* v. *Population Services International*, 431 U.S. 678, 707 (1977) (Powell, J., concurring); *Maher* v. *Roe*, 432 U.S. 404 (1977). The intervenor contends that the statute serves rational as well as compelling state interests.

1. The Need for Emotional Support and Guidance.

By requiring minor girls to seek parental consent in the first instance, the statute insures that minor girls will obtain the emotional support that only a parent can provide when a minor is faced with a pregnancy. Both plaintiffs' and defendants' experts unanimously agreed that a pregnant minor girl undergoes a great deal of emotional stress and that parental support and involvement is extremely important and should be encouraged in every instance[12] (App. II, 44, 47, 51-52, 103-

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[12] Defendants' expert, Dr. Yerkes, testified as follows (App. II, 249-50):

Q Doctor, you mentioned that people are important to the adolescent. What did you have in mind there?

A The adolescent depending upon age lives in two worlds. One is a world of peers and one is a world of family. In terms of emotionally important people, the family are the oldest. They know the individual the best. They are the people I think should be primarily involved, if at all possible. I feel that the family involvement should be the rule for several reasons.

Q What are those reasons?

A The first reason is that an unwanted pregnancy involves an emotional crisis of at least a month to six weeks duration. There is a waiting decision to be made by the adolescent. Though the adolescent in certain ways may be clear upon what decision would be best for her, I think that on the one hand it puts an undue emotional strain, the strain of responsibility upon that individual to make a decision alone. I think having the family involved and the family and that individual working through a decision together that the teenager feels as though they have support in their decision, and that they have come and arrived at the best decision possible.

I think that without the family being involved, the family is not prepared to support that individual through the crisis of three to six weeks following a therapeutic interruption of pregnancy, and there is the most important matter of making one's peace with the decision that has been made.

I have had certain experience, a couple of cases of the family finding out later and feelings coming out, "Well, you made that decision. You live with it."

Where you have the family making the decision, everyone is committed to carrying out that decision ultimately.

104, 137, 226, 249). The statute insures that the minor girl seeks and obtains the parental support and assistance that can help her through probably the first major crisis in her life. It is important that the minor make the right decision for the right reasons. Furthermore, depending upon the age of the minor girl and the circumstances of the pregnancy, the parents can commence immediate steps to deal with the root causes of the pregnancy. By not informing the parents of the pregnancy, the child's needs in this regard could go undiscovered and unresolved[13] (App. II, 250).

2. Selection of a Physician and Medical Facility.

The parental consent provision also insures that a minor girl will have the assistance of her parents[14] in selecting the physi-

[13]See Nadelson, *Abortion Counselling: Focus on Adolescent Pregnancy*, 54 Pediatrics 6:765, 769 (1974) (App. I, 232-33):

> For the adolescent, failure of resolution of the unwanted pregnancy crisis can potentially arrest development progress. The message of pregnancy must be understood and taken seriously if repetition is to be avoided. It is important to remember that the pregnant adolescent is a child potentially bearing a child.

[14]The intervenor, Mrs. Hunerwadel, testified at trial concerning the role she and her husband would play in the event that one of her children desired to have an abortion. Her testimony is as follows (App. II, 270-271):

> Q. Now, I ask you this, Mrs. Hunerwadel, are there circumstances in which you would consent to an abortion to be performed on one of your daughters were she to be found to be pregnant, unmarried and under age 18?
>
> A. Yes, there are.
>
> Q. Tell us what those circumstances would be.
>
> A. We would like to understand the circumstances which led to her pregnancy, the circumstances in her life. We would like to know about the boy by whom she became pregnant, about her feelings about

cian and medical facility to perform the abortion.[15] The need for proper guidance in this decision should not be underesti-

> the pregnancy, her feelings about the baby, her feelings about the boy who would be the father of the child. We would like to be able to make available to her our support and our interest and our care as we have from the time that we have known she was coming to us.
>
> We would like to be sure that she has available all of the alternatives that are available to her and all of the resources in the community, and we would like the opportunity to have her know that we will continue to support her, and if she should decide, in spite of what we were able to show to her in terms of alternatives and support and how we felt, that she just must have an abortion, we would consent to that; that that would not be the end of our involvement.
>
> We would also want to be sure that she had a gynecologist-obstetrician whom we felt was professionally skilled, and beyond that, who had the qualities of interest and sensitivity and humanitarianism which we regard to be important in physicians; and we would also want to be sure that the facility that was chosen in which the abortion were to be done was one which had adequate services all around, because we do not regard the situation of unplanned pregnancy to be a separate situation which is begun, ended and then is out of the youngster's life.
>
> We feel that the youngster, as everybody does, brings feelings of circumstances into the situation and that also circumstances and feelings continue after, whether it is a completed pregnancy or an abortion.
>
> And we would foresee needing follow-up care for this youngster, psychiatrically, probably, at some time if not immediately.
>
> So those kinds of decisions would be very important to us to help her to make.

[15]An abortion is not a simple, uncomplicated procedure as plaintiffs seem to imply. A first trimester abortion performed by vacuum aspiration is classified as a surgical procedure and involves a serious bodily intrusion for a minor girl (App. II, 70-71).

As Dr. Zupnick testified, this procedure involves the insertion of a speculum, dilators and the nozzle of the aspirator into the vagina and uterus of the girl (App. II, 185-186). It involves the use of anesthesia (App. II, 186), and the procedure is followed by bleeding which usually lasts two or three days but may last as long as ten days or more (App. II, 207). Moreover, there is the risk of complications. The physical complications which may

mated.[16] As it is true with all professions, the quality of medical care can vary widely from physician to physi-

result from an abortion include perforation of the uterus, which can cause sterility, and fever or pain, which is indicative of infection (App. II, 66-67). There is also an increased risk in subsequent pregnancies of premature deliveries, spontaneous mid-trimester abortions and faulty implantation with subsequent errors in placental development (App. II, 219-220). Moreover, if the girl has blood type of RH-negative, an injection of RHO-gram serum must be given within 72 hours of the abortion or there is a risk that subsequent pregnancies could result in the birth of what is commonly known as a "blue baby" (App. II, 203-204). About 15 per cent of the population have a blood type of RH-negative (App. II, 203).

[16] Recently, two female reporters from the *Chicago Sun-Times* conducted an investigation into Chicago-area abortion clinics. Some of their findings, which were summarized in *Time*, November 27, 1978, at 52, are as follows:

> Doctors perform abortion procedures on women who are not pregnant.
>
> Operations are performed by inexperienced or unqualified people, including moonlighting hospital residents and at least one doctor who lost his license to practice in another state, and is appealing a similar decision by Illinois.
>
> Clinics are run under unsanitary conditions, and use haphazard procedures. This has sometimes led to severe infections and internal damage that later requires the patient to have a hysterectomy. In one clinic the staff cleaned procedure rooms between patients by wiping up blood with wet tissues. One doctor . . . went from one abortion to the next without washing his hands or donning sterile gloves. Another doctor . . . performed an abortion while a nurse gave him what the *Sun-Times* described as a "sensual massage," and on another occasion did several procedures after drinking champagne at a clinic party.
>
> Some clinics use an assembly-line system in which doctors perform operations within three minutes (a safe abortion usually takes about 15), do not administer anesthetics or do not wait for them to take effect, and race each other to see who can perform the most operations in a day. According to the investigators, [one of the doctors investigated] may provide the fastest and most painful abortions in Chicago. He makes a pencil mark on the leg of his scrub suit for each abortion and tallies them up at the end of the day. In their haste, doctors often fail to remove all the necessary tissue. Sometimes they perforate the uterus or vagina.

cian[17] and from medical facility to medical facility. It is extremely important that the minor girl receive proper counseling and medical care. It is common knowledge that most minor girls simply do not have the experience to make informed decisions concerning the relative abilities of physicians.

II. The Statute is Narrowly Drawn to Serve the Best Interests of Minor Girls.

A. *What the Statute does Not Cover.*

It is important to view the statute not only in reference to the situations it covers but also in reference to the situations that it does not cover. First, under Mass. G.L. c. 12, § 12Q, the statute does not apply in the event of an emergency. Second, the statute only applies to unmarried girls under the age of eighteen. It does not apply to married girls. Cf. *Carey* v. *Population Services International*, 431 U.S. 678, 707-708 (1978) (Powell, J., concurring) (statute held unconstitutional because it prohibited distribution of contraceptives to minors

> Clinics are also guilty of shoddy record keeping; falsifying records of patients' vital signs; failing to order postoperative pathology reports; and ignoring, scrambling or losing results of lab tests.
>
> Women are not counseled to consider carefully their decision to have an abortion. Instead, they are sold on the operation through high-pressure tactics and false information. At [one of the clinics], telephone operators were told: "We have to corral the patients."

[17] The selection of a competent, sensitive and ethical physician is not as easy as one may like to think. When plaintiffs' expert, Dr. Sturgis, was asked whether he was aware of doctors who perform surgical operations based on personal beliefs, such as aversion to welfare, population control and their conception of what was an ideal family, he responded, "I am certainly aware of all sorts of doctors who are not following the code" (App. II, 69-70).

except by physician even though minor girl is married). Third, the statute only applies to girls under the age of eighteen. It should be remembered that up until the early 1970's many states still used twenty-one as the age of majority.[18]

B. *The Statute as Interpreted by the Supreme Judicial Court is Sufficiently Narrow so as Not to Infringe on the Rights of Minor Girls.*

In *Baird* v. *Attorney General, supra,* the Supreme Judicial Court went to great lengths to interpret the statute in a manner so as to avoid unduly intruding into the right of a minor to obtain an abortion. First, and perhaps most importantly, the court held that, in determining "good cause," a judge of the Superior Court may only consider only the best interests of the minor girl and "must disregard all parental objections, and other considerations, which are not based exclusively on what would serve the minor's best interests." 360 N.E. 2d at 292. Second, the court held that the Superior Court would act expeditiously and that steps would be taken to insure confidentiality. These two factors distinguish the Massachusetts statute from other statutes which have been held to be overly burdensome. See *Doe* v. *Rampton*, 366 F. Supp. 189 (D. Utah 1973) (statute required a judicial hearing on voluntariness of a minor's consent even when minor's parents consented to the abortion).

C. *The Statute's Requirement of Parental Consultation is Not Overly Burdensome.*

The plaintiffs have contended, and the District Court held, that the Massachusetts statute is unconstitutional because it

[18] Massachusetts lowered the age of majority from twenty-one to eighteen in 1973. See Mass. St. 1973, c. 925, § 1, amending Mass. G.L. c. 4, § 7, *forty-eighth* through *fifty-first.*

requires a minor girl to consult her parents in all cases where she desires to obtain an abortion. The District Court held that some parents are physically or emotionally unwell or would oppose a minor's right to seek the consent of a judge of the Superior Court. In so doing, the Court stated:

> Parents have many years, however, to offer guidance, and to indicate support. However surprised an individual parent may be to find a daughter pregnant, given the present high incidence of pregnancy, the possibility seems too great for concerned parents to disregard until it happens. If the family relationship is such that communication has not been attempted, or successful, before pregnancy we agree with the expert who doubted the efficacy of a last-minute, state-compelled consultation. *Baird III*, 450 F. Supp. at 1003.

This statement directly contradicts the well-established principle that parents are presumed to act in the best interests of their minor children. The District Court seems to take the view that a last-minute consultation with the physician is better than a last-minute consultation with the parents. See dissenting opinion of Julian, J., 450 F. Supp. 1006. Parental consultation is something that should be encouraged because parents are the ones most likely to provide the love and support that the young girl so desperately needs. The record in this case clearly establishes that parental notification is in the minor's best interests except in rare instances (App. II, 104, 139). In the usual case, a minor's fears about notifying her parents are not realized in fact (App. II, 104, 139).

In view of the evidence presented on the issue of parental notification, the intervenor contends that the statute is constitutional on its face. The statute should be "judged by

reference to characteristics typical of affected classes rather than by focusing on selected, atypical examples." *Califano* v. *Jobst*, 434 U.S. 47, 55 (1977). In view of the fact that the plaintiffs limited their constitutional challenge to a facial attack on the statute, the statute should be upheld. However, to the extent that the Court perceives any constitutional defect with respect to parental consultation, it should place a limiting construction on the statute in accordance with the opinion of the Supreme Judicial Court.

D. *The Statute does Not Unconstitutionally Discriminate Against Mature Minor Girls Capable of Giving an Informed Consent.*

The only other reason advanced by the District Court for invalidating § 12S relates to mature minors capable of giving an informed consent. It found "no reasonable basis for Massachusetts distinguishing between a minor and an adult, given a finding of maturity and informed consent." 450 F. Supp. at 1004. The District Court found this to be an "undue burden in the due process sense, and a discriminatory denial of equal protection." 450 F. Supp. at 1004.

The point at issue here is the Supreme Judicial Court's answer to a question concerning the standard to be applied by the Superior Court in determining whether to give consent to an abortion. The Supreme Judicial Court stated as follows:

> Question 2(b) concerns what a judge must do in passing on the question whether the best interests of the minor will be served. Unless a contrary conclusion is compelled constitutionally, we do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge must make a determination of those circumstances,

> but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him. We suspect that the judge will give great weight to the minor's determination, if informed and reasonable, but in circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact. 360 N.E. 2d at 293.

The intervenor contends that the "best interests of the minor" test propounded by the Supreme Judicial Court is constitutionally permissible. The mere fact that a minor girl may be capable of understanding the mechanics of a medical procedure such as a therapeutic abortion does not necessarily mean that the minor girl has the intellectual and emotional ability to make a decision which serves her long term best interests. As Justice Stevens stated, concurring in *Planned Parenthood*:

> In each individual case factors much more profound than a mere medical judgment may weigh heavily in the scales. The overriding consideration is that the right to make the choice be exercised as wisely as possible. 428 U.S. at 104.

Nevertheless, even if such a distinction was found to be constitutionally impermissible, the District Court was not justified in invalidating the entire statute. The Supreme Judicial Court specifically stated that the statute be construed in such a manner as to render it constitutional. It stated:

> If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we

should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation. 360 N.E. 2d at 292.

The majority of the District Court rejected this advice and declared the entire statute unconstitutional. Judge Julian in his dissenting opinion stated that he would not declare the entire statute unconstitutional but rather would strike out the provision in question and allow "a minor who is found by a judge to be capable of a reasonable and informed consent will be treated as an adult and allowed to exercise her right to an abortion." 450 F. Supp. at 1016.

Conclusion.

For reasons stated herein, the intervenor requests that the Court reverse the order of the District Court.

Respectfully submitted,

BRIAN A. RILEY,
Suite 520,
40 Court Street,
Boston, Massachusetts 02108.
(617) 523-3240
Attorney for Intervenor.

Of Counsel:

THOMAS P. RUSSELL,
Suite 520,
40 Court Street,
Boston, Massachusetts 02108.
(617) 523-3240

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In the Supreme Court of the United States

October Term, 1978

Nos. 78-329, 78-330

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, et al.,
Appellants in No. 78-329,
and
JANE HUNERWADEL,
Appellant in No. 78-330

v.

WILLIAM BAIRD, et al.,
Appellees in Nos. 78-329, 78-330.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF APPELLEES

JOSEPH J. BALLIRO
JOAN C. SCHMIDT
LAW OFFICE OF JOSEPH J. BALLIRO
One Center Plaza
Boston, Mass. 02108
(617) 723-1980
Attorneys for Appellees

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In the Supreme Court of the United States

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF APPELLEES

Appellees respectfully submit this brief in support of the decision of the three-judge district court, and ask that the judgment below be affirmed.

Statement of the Case

The statement by Appellees should be supplemented as follows:

I. THE PARTIES

At the first trial of this matter, Mary Moe testified in camera before the three-judge federal court. At that time she was age sixteen and lived at home with her parents and three other siblings. (Tr. 131, Dec. 31, 1974).[1] She was in the tenth grade. (Tr. 145).

When Mary Moe first thought she was pregnant, she sought a pregnancy test at a health clinic in her home town. She had to wait 43 days, however, before such a test would be definitive. During that time, she considered the alternatives to an abortion such as continued pregnancy and/or adoption. (Tr. 133). She discussed these options with two of her girlfriends and her oldest sister. (Tr. 141).

Mary Moe made a carefully reasoned, sensitive decision not to inform her parents of the pregnancy and her planned abortion. As the District Court stated:

> "Her father had told her, in connection with the pregnancy of a contemporary friend, that if that happened to her he would evict her and kill her boyfriend. . . . Her reasons for not informing her parents were in part apprehension of what might happen to her as a result of their learning she had had intercourse, in part the fear of what would happen to her boy friend, and in part the desire to spare her parents' feelings." *Baird* v. *Bellotti,* 393 F. Supp. at 847, 850 (D. Mass. 1975), (Baird I).

[1] All references to testimony by Mary Moe are to the impounded second transcript volume of the first trial (Baird I) dated December 31, 1974, which is on file with the Court. The facts concerning testimony given at the first trial were contained in the Brief of Appellees filed in this case during the October Term, 1975 and are reproduced here for the Court's convenience. The second trial resulted in the opinion reported at 450 F. Supp. 997 (D. Mass. 1978) referred to in this brief as *Baird* III.

Mary Moe showed particular and respectful concern for her mother and father. She testified that her mother "would get very upset . . ." (Tr. 134), and "might have a breakdown. . . ." (Tr. 136) She also commendably "wanted to finish school," (Tr. 135) and did not want to be "kick[ed] out of the house. . . ." (Tr. 135). While she could have legally remained in attendance at high school, she understandably chose to avoid the well recognized "additional difficulties and continuing stigma of unwed motherhood. . . ." *Roe* v. *Wade,* 410 U.S. 113, 153 (1973). Appellants produced no evidence that attending school while pregnant and unmarried could be beneficial to a sixteen year old young woman.

Appellants have not questioned the reasoning or sensitivity of Mary Moe in deciding to protect her parents from the knowledge of her pregnancy and abortion. Nor have Appellants suggested in any way that parental involvement might have added to the quality of her decision or her medical care. It was Mary Moe, not the Commonwealth, who showed positive concern for harmonious preservation of the family unit. The District Court found that

> "she had made a considered decision, before she learned of her pregnancy, that in case of pregnancy she would seek to abort. . . . [*S*]*he was competent to make and effectuate that decision. . . .* [*S*]*he is fairly representative of a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents.*" *Baird* I at 850 (Emphasis supplied).

The women's health clinic provided Mary Moe with "different names of different places you could go. . . . [I]t was up to [her] to choose. . . ." (Tr. 136). They also gave her educational material on different methods of birth control and abortion. (Tr. 136). She had only $20 and borrowed $5 more from her sister. (T. 140). The health clinic listings of abortion centers gave Parents' Aid Society as "the only place that listed anything about financial trouble." (Tr. 140).

Parents' Aid and Dr. Zupnick accepted Mary Moe as a patient for the $25 fee, reduced from the usual $150.[2] (2 App. 177).

In addition to the informational material provided Mary Moe, she received about two hours of professional counseling at Parents' Aid Society from a trained registered nurse, Marilyn Morrissey. (Tr. 140). This included a discussion of the abortion procedure, birth control, breast cancer, and related topics. (Tr. 141) There was ample opportunity to ask questions. (Tr. 141). Previously, Mary Moe had received no sex education at school or in her home and had been unable to obtain contraceptives because she was under age 18. (Tr. 132, 146).

When Mary Moe first telephoned Ms. Morrissey, she was encouraged to tell her parents of the pregnancy if possible. (Tr. 143: "[I]f you can tell them, you probably should. . . ."). She chose not to do so for the reasons stated.

In view of the rapidly approaching effective date of the statute (November 1, 1974), Parents' Aid Society and Dr. Zupnick scheduled Mary Moe for her abortion on the evening of October 31, 1974, rather than the following week as she had requested. (Tr. 138).

[2] The regular practice of accepting patients for such sharply reduced fees, and Mary Moe for $25, is consistent with the nonprofit structure of Parents Aid Society, Inc. Fifteen percent (15%) of the patients pay no fee. *Baird* I at 851.

Mary Moe had heard about the statute from a girlfriend and volunteered to be a plaintiff. (Tr. 138). She offered to "do" an affidavit. (Tr. 148). Her sworn statement was presented to the single district judge in support of the motion for a temporary restraining order. (Tr. id.)

As scheduled, and after the order was granted, Mary Moe obtained her abortion. There were no complications. (Tr. 142). She had no bad dreams or depression following the procedure. (Tr. 167). The District Court fully credited her testimony. *Baird* I at 850 and nn. 4-5.

The other plaintiffs also testified extensively and were supported by prominent expert witnesses.

William Baird, who earlier before this Court successfully challenged the Massachusetts birth control laws, see *Eisenstadt v. Baird*, 405 U.S. 438 (1972) is the director of Parents' Aid Society, Inc. as well as its chief counselor. Baird claims standing because of the threat of prosecution as an aider, abettor, or accessory before the fact.

As the District Court noted, Baird "had been arrested without warning in connection with the Massachusetts birth control statute, so-called. . . . [He] had every reason to believe that they had only two alternatives — to continue their current activities and face immediate arrest, or to bring the present suit." *Baird* I at 852. Previously, Massachusetts authorities went so far as to arrest an Ohio clergyman for merely referring a woman to Massachusetts for an abortion.[3] Baird is much more overtly involved in pre-abortion counseling as director of an abortion center. His standing to sue is clear.[4] The probability of Baird's

[3] *Commonwealth* v. *Hare*, 361 Mass. 263, 280 N.E.2d 138 (1972). A second clergyman was prosecuted on similar facts in *Commonwealth* v. *Schaflander*, 361 Mass. 850, 279 N.E.2d 670 (1972). The accessory before the fact statutes are MASS. G.L. c. 272, § 19, & c. 274, § 2.

[4] The discussion in *Eisenstadt* v. *Baird* further supports this conclusion. 405 U.S. at 443-446. *Accord*, *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973) (physcian standing); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968).

having been prosecuted for continuing his counseling activities is far greater than that expected by an out-of-state clergyman passing out telephone numbers to pregnant women. He has as much standing as Mary Moe or Dr. Zupnick, the co-appellees, or the theater manager in *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 217 n.16 (1975). The District Court found it unnecessary to resolve the dispute over Baird's standing. *Baird* I at 851. Baird is a proper party in this appeal and views the issue as highly important to counselors, nurses, and auxiliary health personnel in view of the *Hare* and *Schflander* prosecutions. In light of his independent status as an Appellee he asks this Court for a definitive ruling.

Dr. Gerald Zupnick, principal operating physician at the Parents' Aid Society Boston abortion center, testified to his practice and experience with first trimester abortions, and with minor patients.

It was uncontradicted that other abortion centers referred patients to Parents' Aid Society, particularly "minors who do not have parental consent or patients who do not have the usual fee . . . ." (2 App. 167). About 15% of the patients are treated free of charge.

Dr. Zupnick had not encountered any minors incapable of giving an informed consent. (2 App. 169). He thought this to be possible only in case of "mental retardation." (App. Id.). About 30% of the patients at Parents' Aid are minors, and about one-half of those preferred not to inform their parents. (2 App. 184). Dr. Zupnick has encouraged minors to inform their parents. (App. id.)

The bulk of Dr. Zupnick's testimony consisted of an explanation of what transpires during the four or five hours a patient is at the abortion center. He explained that

> "[m]ost often [the patient's reaction] is relief at the completion of the procedure and surprise as to simplicity. . . ." (2 App. 172).

This was explained in part by the fact that "most younger patients do not have the usual stigmata of illegal abortion in their heads." (2 App. 174). Reactive guilt or hostility were "rare." (2 App. 172).

There was a 75% follow-up of patients by one of "several cooperating physicians" in the Boston area. (2 App. 172-173).

Appellants, as advocates, have attempted to portray the Parents' Aid abortion center as an assembly line impersonal operation. The Record is to the contrary.

II. EXPERT TESTIMONY

(A) *The first trial — Baird I*

Defendants' and Defendant-Intervenors' expert, Dr. Jules Rivkind "[had] not performed abortions under any circumstances." (2 App. 231). He was the sole gynecological expert called by Appellants. The hospital at which he was chairman permitted no abortions, no sterilizations, and no use of birth control pills, except "for the control of gynecological problems." (2 App. 227). He had conducted no research and written no articles on abortion or adolescent pregnancy. (2 App. 229).

Dr. Rivkind admitted that "90% of the first trimester abortions in this country are performed outside of hospitals. . ." (2 App. 236), but still insisted that the procedure was unsafe.

In view of his admitted bias and limited background, Dr. Rivkind was unqualified to offer competent testimony concerning minors' access to elective abortion. He opposed such access categorically, did not support the policy on

abortion of the American College of Obstetricians and Gynecologists, and was opposed to the position taken in *Roe* v. *Wade*, 410 U.S. 113 (1973).

Dr. Rivkind did not require parental consent for minors seeking treatment of V.D., because Pennsylvania state law did not require such consent. (2 App. 230). Presumably he wouud follow a law or decision waiving parental consent in the abortion area also.

Defendants and Defendant-Intervenors also called a child psychiatrist, Dr. Raymond Yerkes. He had conducted no studies and written no articles on the subject of adolescent pregnancy. (2 App. 254-55) Dr. Yerkes had dealt with only about 30 pregnant patients under age 18 in the last twelve years. (2 App. 245).

He thought that minors under age 18 could give an informed consent to V.D. treatment. (2 App. 256). Dr. Yerkes admitted that "some" unmarried minors when pregnant could rise to the responsibility of making their own life decisions. (App. Id.) Significantly, Dr. Yerkes admitted that 17 year olds who chose not to abort would need more professional support than those who obtained abortions. (2 App. 529) He agreed that "emotional support can be provided for a pregnant minor without requiring parental consent." (2 App. 261) He further admitted that the desirability of abortion for a minor "depends upon the individual circumstances of the patient and the family and the particular situation in life." (2 App. 264) Finally, Dr. Yerkes acknowledged that

> "there is a sub-class of teenagers for whom the families either are not filling their role or for whom they already left their families. . . . [I]n this situation medical and mental health professionals have a certain responsibility to perform an emotionally supportive role." (2 App. 266).

Plaintiffs' expert Dr. Somers H. Sturgis, professor emeritus in gynecology at Harvard Medical School was the gynecological consultant to the first Adolescent Clinic in the United States. (2 App. 4). He is "closely allied to a clinic in the neighborhood of Boston where legal abortions are done. . . ." (2 App. 12-13). About 10% of their patients are under 18. (2 App. 13).

Dr. Sturgis testified that:

> "[A]ge is no criterion of development and maturity. . . . [E]ach individual must be judged by the doctor . . . most qualified perhaps to judge the degree of maturity and responsibility as well as the medical need for help." (2 App. 12).

He stressed that unwanted pregnancy is a "social and emotional tragedy to an adult," but "even worse" and a "much more serious predicament" for a minor. (2 App. 7).

Dr. Sturgis saw no medical reasons for denying abortions to persons under age 18.[5] He stated:

> "[A]t 16 a great majority of the girls certainly would be able to give an informed consent. But the age level is not what a doctor regards as the way to judge whether this individual or that individual should have responsibility for their medical treatment." (2 App. 15).

As to the minor patients' psychological reaction to an abortion, Dr. Sturgis stated: "[I]n the vast majority of cases the young people are tremendously relieved." (2 App. 17).

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[5] Indeed, he stated: "[T]he younger the child the higher the risk with an unwanted pregnancy." (2d App. 16).

Dr. Jane E. Hodgson, associate professor at the University of Minnesota, a Mayo Clinic graduate, and the author of numerous leading studies on first trimester abortion, testified next. Dr. Hodgson supervised over 25,000 such abortions as Medical Director of Pre-Term in Washington, D.C. About 11% of those patients were under age 18.

Dr. Hodgson explained that minors have a greater need for abortions than adults because with term pregnancy "the risk of toxemia and premature labor, hemorrhage, Cesarean section, neo-natal mortality, even maternal mortality is much higher. . . ." (2 App. 30). She pointed out that "[t]eenage pregnancy is very disruptive in the family." (App. id.).

As to the ability to understand the abortion procedure and given an informed consent, Dr. Hodgson observed:

> "I don't think chronological age enters into the problem except the very immature or the sub-normal, mentally sub-normal individual." (2 App. 32).

She has found that "some 12-year olds will be more mature than 18-year olds." (2 App. 34). She had seen a 13-year old patient capable of giving an informed consent and a 19-year old who lacked such understanding and capacity. (2 App. 35).

Dr. Hodgson illustrated some of the types of situations in which parents should not be told of a teenage daughter's pregnancy:

> "Illness on the part of the parents . . . where patients are concerned over their father's coronary status or their mother's emotional illness, alcoholism, marital instability, instability in the home, marital discord." (2 App. 37).

She answered the charge of physician conflict of financial interest by pointing out that fees for prenatal care and delivery are usually higher than those for abortion. (2 App. 41).

The third Plaintiff expert was Dr. Carol Nadelson, an assistant professor of psychiatry at Harvard Medical School and a psychiatrist at a major Boston hospital. She had extensive experience for "several years" "evaluating pregnant teenagers." (2 App. 42) She has published numerous articles relating to teenage sexuality, abortion and counseling in the medical literature.

Dr. Nadelson emphasized that a requirement of parental consent delays an abortion procedure and that this is hazardous to the patient, both medically and psychiatrically. (2 App. 43-44). She observed that parents of pregnant teenagers "often feel guilty and angry. They may feel punitive towards the child. . . ." (2 App. 45).

Most minors she evaluated who had abortions "felt relieved by it. They feel that they have done the right thing and have a second chance often." (App. Id.) Less than 1% have clinically significant guilt or experience regret. (App. Id.).

Dr. Nadelson's experience was that most 17-year olds can give an informed consent. She stated: "I think the difficult time is in the 11, 12 and 13-year olds that we see. It is much more time consuming and difficult for them to understand what it means." (2 App. 47). She had had particularly difficult cases such as parents of a 13-year old who opposed an abortion on religious grounds. (App. Id.). She agreed with Dr. Hodgson that "one can find a 13-year old who is better able to make a decision than a 17-year old." (2 App. 132).

Asked whether parents are most suited to provide emotional support to a pregnant teenage daughter, Dr. Nadelson replied: "Some are and some are not." (2 App. 133).

She explained that parents "may at times be the worst people that one could talk to because they are so upset." (2 App. 134).

Finally, it was also Dr. Nadelson's experience that she had encountered no one in the 12 to 17 year old group who could not give an informed consent. (2 App. 142). She knew of only one instance in which case the patient was mentally retarded (2 App. 142-143).

(B) *The Second Trial, Baird III*

At the second trial, the Defendants called Sprague W. Hazard, a Massachusetts physician. As a member of the American Academy of Pediatrics Dr. Hazard assisted in the drafting of "A Model Act Providing for Consent of Minors for Health Service." With regard to a hypothetical assessment of the impact on the pregnant minor and her family of the situation where the "parents are unalterably opposed to the abortion and where the adolescent has been forced, because she wants an abortion, to bring a complaint in court and ask the court for assistance," Dr. Hazard responded that ". . . the child has become a pawn in that situation." She might "suffer severe psychological trauma as a result . . ." and that "it would be an unfortunate experience." (2 App. 421-422) An additional question concerning the same subject brought this response from Dr. Hazard:

> "It seems to me that when affairs have reached this point where the relationship between the parents and the child have become a courtroom issue that I would have a lot of misgivings about the validity of the relationship between the parents and the child and how capable they are of being valid support for this child in the future." (2 App. 426).

Dr. Carol Nadelson again testified on behalf of the Plaintiffs. She stated "that the impact of the requirement to initiate judicial proceedings of any kind would be severly detrimental to a teenager, particularly since she has just met with her parents' disapproval, which is difficult enough." (2 App. 296) Based on her past experience she suggested that rather than "confront their parents" or "any other authority about the problem" . . . pregnant minors may avoid these problems "by going out of state, by attempting abortions themselves or finding non-medical means of obtaining abortions . . ." (2 App. 300).

In considering the Massachusetts statute which permits certain classes of emancipated minors to consent to all types of medical and surgical care, except for abortion and sterilization, Dr. Nadelson was struck by the fact that ". . . a teenager could probably consent to a hysterectomy and not to an abortion."[6] (2 App. 307). Abortion, in the

[6] Mass. General Laws ch. 112 § 12F provides as follows:

> "No physician, dentist or hospital shall be held liable for damages for failure to obtain consent of a parent, legal guardian, or other person having custody or control of a minor child, or of the spouse of a patient, to emergency examination and treatment, including blood transfusions, when delay in treatment will endanger the life, limb, or mental well-being of the patient.
>
> "Any minor may give consent to his medical or dental care at the time such care is sought if (i) he is married, widowed, divorced; or (ii) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or (iii) he is a member of any of the armed forces; or (iv) she is pregnant or believes herself to be pregnant; or (v) he is living separate and apart from his parent or legal guardian, and is managing his own financial affairs; or (vi) he reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease.
>
> "Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization.

first trimester has less physical risks than many other medical and surgical procedures, including hysterectomy. Furthermore, ". . . abortion in and of itself does not have serious psychological consequences . . . which might be found in other procedures such as hysterectomies . . . where the person is either more ill to begin with or the repercussions later on for her life would be more severe." (2 App. 313-314). Carrying a pregnancy to term has a greater impact on the adolescent than having an abortion. (2 App. 314).

In response to a question about whether parents could be of help in making sure the teenager got some type of counseling, Dr. Nadelson agreed that "[t]hey could," and added "but they often don't." (2 App. 546) She felt that

"Consent given under this section shall not be subject to later disaffirmance because of minority. The consent of the parent or legal guardian shall not be required to authorize such care and, notwithstanding any other provisions of law, such parent or legal guardian shall not be liable for the payment for any care rendered pursuant to this section unless such parent or legal guardian has expressly agreed to pay for such care.

"No physician or dentist, nor any hospital, clinic or infirmary shall be liable, civilly and criminally, for not obtaining the consent of the parent or legal guardian to render medical or dental care to a minor, if, at the time such care was rendered, such person or facility; (i) relied in good faith upon the representations of such minor that he is legally able to consent to such treatment under this section; or (ii) relied in good faith upon the representations of such minor that he is over eighteen years of age.

"All information and records kept in connection with the medical or dental care of a minor who consents thereto in accordance with this section shall be confidential between the minor and the physician or dentist, and shall not be released except upon the written consent of the minor or a proper judicial order. When the physician or dentist attending a minor reasonably believes the condition of said minor to be so serious that his life or limb is endangered, the physician or dentist shall notify the parents, legal guardian or foster parents of said condition and shall inform the minor of said notification."

counseling for minors experiencing unwanted pregnancies was very important but that there was a serious lack of resources for this purpose. (2 App. 500).

Dr. Nadelson reiterated that the abortion decision cannot be viewed in isolation. The consequences of carrying to term must be evaluated. "The future orientation vis-a-vis the continuing pregnancy is far more difficult than vis-a-vis an abortion because the implications are lifelong and unchangeable, and evidence is that people certainly have more effects either from having a child they don't want and trying to bring it up or giving a child up for adoption. . . . Having the abortion has some effect, like any crisis people have in their lives, and people have lots of them. Having a pregnancy and continuing is something that somebody lives with the rest of their life." (2 App. 548-549)

In sum, the testimony for Appellees does not detract from but in fact supports Appellants. All parties admit that emotionally supportive parental involvement should be encouraged if at all possible. It is destructive, however, to the family unit for the Commonwealth to compel such involvement over the objection of physician and patient in every case. That is the objectionable quality of the statute in question. "[O]ne's experiences [and] one's exposure to the raw edges of human existence"[7] compel recognition of the fact that minors and the family unit need protection from the disruption which might erupt from applying this statute.

III. ADDITIONAL FACTS IN EVIDENCE

Statistical evidence about teenage sexuality and pregnancy was introduced through a publication of the Alan

[7] *Roe* v. *Wade*, 410 U.S. at 116.

Guttmacher Institute entitled "11 Million Teenagers".[8] This publication gathers together in a convenient format the most recent data on adolescent sexuality, pregnancy and childbearing. These data show that teenage childbearing rates in the United States are among the world's highest; half of unmarried women have intercourse by age 19; 11 million American teenagers are sexually active; one million teenagers become pregnant each year; over over 600,000 teenagers give birth each year; one-fifth of all births in the United States are to teenagers; nine out of ten of these teenage mothers keep their babies; one-third of births to teenage mothers are out of wedlock; one-third of births to married teenage mothers are conceived prenuptially; two-thirds of teenage pregnancies are unintended; babies of teenage mothers are more likely to die soon after birth than babies of older mothers; babies of teenage mothers are more likely to be premature and of lower birth weight than babies of older mothers; the risk of maternal death, illness or injury are greater for teenage mothers than for older mothers; teenage mothers are not likely to complete high school; pregnancy is the most common cause of female school dropouts; teenage mothers face greater risks of unemployment and welfare dependence than older mothers; the younger the woman at the time of her first birth, the poorer her family is likely to be; teenage marriages are much more likely to end in divorce and separation than are marriages between persons in their twenties; teenage mothers are less likely to get prenatal care than older mothers; birth control services are not available to a substantial number of teenagers; and one-third of abortions are obtained by teenagers.

During the discovery process prior to the second trial, the State defendants admitted the following facts in response to a request for admissions: (1) that there are minors under the age of eighteen who are intellectually and emotionally able to comprehend the abortion procedure and its consequences; (2) that delay in the abortion decision or its effectuation can cause psychological and medical problems; (3) that there are parents who are not supportive when they learn of an unmarried daughter's pregnancy; (4) that there are minors who correctly fear that physical harm would come to them if one or both of their parents knew of their pregnancy; (5) that there are parents of pregnant minors who would under no circumstances consent to an abortion for their daughters; (6) that there are parents who would attempt to make their pregnant minor daughters enter into marriages the daughters do not want; (7) that there are minors who do not want to inform their parents of their pregnancies because they do not want to cause their parents distress; (8) that there are parents who would insist that their pregnant minors continue their pregnancies as a punishment or to teach them a lesson; (9) that the incidence of sexual activity among minors is high and the consequences of such activity are frequently devastating; (10) that teenage motherhood invokes a host of problems, including adverse physical and psychological effects upon the minor and her baby, the continuous stigma associated with unwed motherhood, the need to drop out of school with the accompanying impairment of educational opportunities and other dislocations, including forced marriage of immature couples and the often acute anxieties involved in deciding whether to secure an abortion; (11) that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low or lower than the rates for normal childbirth; (12) that time, of course, is critical in abortion.

[8] "11 Million Teenagers, What Can be Done About the Epidemic of Adolescent Pregnancies in the United States," The Alan Guttmacher Institute, New York, 1976. This booklet comprises Volume 3 of the Record in this case.

Risks during the first trimester of pregnancy are admittedly lower than during later months.

The facts admitted above were drawn for the most part from findings made by the three-judge court in *Baird* I. It is safe to say that facts concerning teenage pregnancy and the abortion experience as related to the issues in this case are substantially not disputed. It is also overwhelmingly clear that all experts agree that a decision arrived at by the pregnant minor and her parents which reflects the minor's best interests is the ideal situation. However, for many adolescents parental awareness of the pregnancy could seriously endanger their wellbeing. The alternatives for these adolescents are bleak indeed.

IV. FINDINGS OF THE DISTRICT COURT

(A.) *The First Trial — Baird I*

First, the three-judge court upheld the class action nature of this litigation, holding:

> "We find that Mary Moe, Parents Aid Society, Inc., and Gerald Zupnick have standing, as representative party plaintiffs, and Jane Hunerwadel as intervenor. . . . [T]hey have a strong personal interest and are competently and vigorously represented by legal counsel, and we certify this as a valid class action as to all." *Baird* I at 852.

As to medical facts the District Court found that an abortion in the first trimester does not impose "any greater risks for minors than for adults." *Baird* I at 853.

The District Court found that parental support is desirable in general but that "an appreciable number[of parents] are not [supportive] for a variety of reasons." *Baird* I at 853. Also, "parents may seek to control sexual behavior by threats that they do not mean, or would not carry out . . . but which nonetheless serve to destroy intercommunication." *Baird* I at 853.

Significantly, the District Court held:

> "We *must find,* however, that a significant number of minors who are capable of consenting are unwilling to tell their parents, either because they correctly fear what would happen to themselves, or, although they would expect support from their parents in one sense, they know their parents would under no circumstances consent to the abortion they wish, or, because of their views on illegitimacy and the stigma attaching to unmarried mothers, would attempt to make them enter into a marriage they do not want." *Baird* I at 853 (Emphasis supplied).

The evidence on this point was overwhelming. It supports the view of Appellees that a statute requiring consent of one parent, or consultation with a parent, or notice to a parent, would invade the patient's privacy as much as the one at issue here.

The three-judge court further found that:

> "There are also minors who, understandably, do not wish to have their parents know of their condition because of the distress that it would cause them. . . ." *Baird* I at 853.

The District Court "accept[ed] the testimony of plaintiffs' experienced expert[s] that some parents would insist upon the continuance of the pregnancy simply as a punishment, or to teach a lesson." *Baird* I at 854.

Also, the Court found as "fact that many parents believe with total sincerity that abortion is morally impermissible, either under all circumstances or unless to save the life of the pregnant woman." *Baird* I at 854.

On the capacity of minors, the District Court held:

> "[A] substantial number of females under the age of 18 are capable of forming a valid consent." *Baird* I at 855.

(B.) *The Second Trial — Baird III*

In its second full opinion, the District Court again found that "many, perhaps a large majority of 17-year olds are capable of informed consent, as are a not insubstantial number of 16-year olds, and some even younger." *Baird* v. *Bellotti*, 450 F. Supp. 997, 1001 (1978) (*Baird* III) It also recognized that, "it may be to a minor's best interest that the hearing be held, and the abortion be performed, without her parents' knowledge." *Id.* at 1001

> Parents, physically or emotionally unwell, may be injured by the shock, [of the pregnancy] thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. Defendants concede, and the evidence shows, that an appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or on continuance of the pregnancy as punishment. We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court. This would seem but a normal reaction of persons who hold strong anti-abortion convictions." *Id.* at 1001.

Based on the testimony of Defendants' expert, the District Court found that "a substantial number of minors would refuse to consult with their parents under any circumstances." *Id.* at 1001. The Court went on to cite the uncontradicted testimony of Plaintiffs' expert:

> ". . . that court proceedings over such a personal matter, even if conducted in the most benign manner, would be 'severely detrimental to a teenager . . .' Further, she credibly testified that many minors would not go to court, especially if it had to be against her parents, but rather would resort to illegal and frequently dangerous abortions. But assuming again in the statute's favor that the minor would initiate the proceedings, defendants' own expert expressed the opinion that if she did go to court and was successful, it would be likely to destroy what was left of the family relationship. The minor, accordingly, is in a no-win situation. If she loses the judicial proceedings, it will be a personal blow, and scarcely a redemption of the ill feeling and tension that undoubtedly resulted from her parents' refusal of consent and her taking them to court. If she wins, according to defendants' own expert, she is likely to find herself in an even worse position." *Id.* at 1001-1002

A mature minor who has been refused an abortion she desired would suffer "a highly traumatic experience." *Id.* at 1003.

Under Massachusetts law, the only surgical procedures to which a mature minor may not consent are abortion and sterilization.[9] The evidence before the three-judge court "shows that many other forms [of surgery] are far more complicated and dangerous." *Id.* at 1003-1104

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[9] See Mass. General Laws ch. 112 §12F reproduced in footnote 6.

The abortion decision cannot be viewed in isolation; if an abortion is not performed, childbirth is the inevitable result. With respect to these issues the Court found the evidence supported the conclusions of *Roe* v. *Wade*, 410 U.S. at 149, namely, that pregnancy and childbirth involve greater risks both physically and psychologically than an abortion performed in the first trimester.[10] *Id.* at 1004

The evidence presented by the Plaintiffs, much of which was corroborated by Defendants' own experts and Defendants' responses to Plaintiffs' Requests for Admissions, fully and amply justifies the findings and conclusions of the three-judge court.

Summary of Argument

In the first part of their Argument, Appellees discuss the constitutional questions at issue in this case. The statute requires parental consultation or notification whenever a pregnant minor seeks to obtain an abortion. If a minor is not able to obtain the consent of her parents, she must then petition a judge of the Massachusetts trial court for permission to obtain the desired abortion. The judge can overrule the minor's considered decision to obtain an abortion. The requirement of parental consultation or notification and the possibility of a judicial veto make the statute as construed by the Supreme Judicial Court vague and overbroad and unduly burdensome in light of the minor woman's constitutional right of privacy. Furthermore, the statute denies equal protection of the law by singling out abortion without justification for specialized treatment.

[10] Dahling, et al., *Induced Abortion and Subsequent Outcome of Pregnancy in a Series of American Women*, The New England Journal of Medicine, Vol. 297, no. 23 (December 8, 1977). This study showed that there is no relation between induced abortion and subsequent abnormal outcome of pregnancy.

Appellees' second argument refutes Appellants' contention that the District Court abused its discretion in refusing to permit the Attorney General to conduct a survey of health care practices. The District Court's discretion was properly exercised in light of the tardiness of the Appellant's request. Furthermore, the Attorney General made no attempt to mitigate the supposed error by presenting evidence on this subject at trial.

In argument III Appellees discuss the issue of whether or not the District Court properly allowed plaintiffs to proceed against the statute in a facial attack. The Fourth argument concerns the propriety of the injunction entered by the three-judge court and the reasons why this particular statute could not have been revised judicially.

Lastly, Appellees argue that the District Court order concerning costs was a proper one.

Argument

I. The Statute as Construed by the Massachusetts Supreme Judicial Court Is Unconstitutionally Overbroad and Unduly Burdens the Minor's Right of Privacy.

A. *Minors' Right to Privacy*

As this Court said in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 74 (1976):

> "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."

Minors are not excluded from the constitutionally protected right to privacy. The holding in *Eisenstadt* v. *Baird*,

405 U.S. at 453, did not distinguish between minors and adults in defining the right to privacy as ". . . the right of the *individual,* married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis supplied)

The Supreme Judicial Court has construed the statute to require parental consultation in every case:

> "Parental consultation for an abortion is required by the statute in all cases. *Baird* v. *Attorney General,* 1977 Mass. Adv. Sh. 96, 111 (1977).
>
> . . .
>
> "Section 12(S) in turn is explicit in stating that a judge should pass on an application for a consent order only after one or both parents have declined to consent to the abortion. *Id.* at 106.
>
> . . .
>
> "If they are available, the parents of a minor must be notified of any proceeding brought by her to obtain judicial consent to an abortion and will be entitled to participate." *Id.* at 113.

The District Court found that Mary Moe represents a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent and who do not wish to involve their parents. *Baird* I at 850. However, the Supreme Judicial Court determined that Mary Moe and her class *must* obtain the consent of both parents for an abortion, or they *must* go to court and initiate judicial proceeding in which their parents *must* be involved. Failure to obey the statute as construed can result in criminal sanctions.[11]

[11] See Mass. G.L. c. 112 §12Q and §12T. In addition, the attorney general or parent may petition for an injunction against the performance of an abortion to be performed contrary to the statute. Mass. G.L. c. 112 §12R. The Massachusetts Supreme Judicial Court has recognized that: "[i]njunctions and other threats against licensed physicians may drive determined women into the waiting offices of persons not licensed." *Doe* v. *Doe,* 365 Mass. 556 (1974).

A state-created obstacle need not be absolute to be impermissible. It is enough that it unduly burdens the exercise of a fundamental right. *Doe* v. *Bolton,* 410 U.S. 179 (1973); *Carey* v. *Population Services International,* 431 U.S. 678; 97 S.Ct. 2010 (1977). The statute here is just such an obstacle.

The Massachusetts Supreme Judicial Court reviewed the history of the "mature minor" rule in Massachusetts in its opinion on the questions certified in this case. After a lengthy discussion, the Court said:

> "We conclude that, apart from statutory limitations which are constitutional, where the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth. In such a case, although judicial involvement is not required, court approval may be sought, and, if it is, a judge may give effective consent to the performance of an operation or other treatment." 1977 Mass. Adv. Sh. at 111.

The Court then stated that §12(S) changed this rule and mandated parental consultation in all non-emergency abortions.

Thus, the statute demands that a minor who is capable of giving informed consent must jump another hurdle before being allowed to exercise her constitutional right. She must get the consent of both her parents, and, if refused their consent, she must then go to court with her parents as defendants. 1977 Mass. Adv. Sh. at 114. This

is the kind of "substantial and irrational roadblock" which this Court declared unconstitutional in *Doe* v. *Bolton*, 410 U.S. 179, 198 (1973).

The double layer of consent here is similar to the system declared unconstitutional in *Doe* v. *Rampton*, 366 F. Supp. 189 (D. Utah 1973). In that case the Court declared invalid provisions in the state law which required that access to abortion by a consenting mother be subject to the consent of others in all cases (husband, father of the fetus, parents, or the district court).

Therefore, the statute is far different from the one in the picture painted by the defendants for the Supreme Court:

> ". . . a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests." *Bellotti* v. *Baird*, 428 U.S. 140, 143 (1976).

The District Court found that "the penalty borne by the minor—the burden of seeking a court order—is a heavy one." *Baird* III at 1001. Although finding plaintiffs' arguments concerning the inherent unconstitutional burden placed on the minor by a court proceeding under §12(S) persuasive, the three-judge court decided the issue on a more limited basis, and held that "it is an improper burden on those cases where a court, if given free rein, would find that it was to the minor's best interests that one or both of her parents not be informed, but is forbidden by the statute to make this decision." *Baird* III at 1002.

In *Wynn* v. *Carey*, 582 F.2d 1375, 1388 (1978), the Seventh Circuit upheld a preliminary injunction against an Illinois statute[12] patterned after §12(S) stating:

> If one or both of the parents refuse to consent to the abortion, the Act requires that the minor must initiate judicial proceedings to override this veto. We find this to be an undue burden such as that held unconstitutional in *Doe* v. *Bolton*, 410 U.S. 179 (1973).
>
> A decision to obtain a court order presupposes an awareness of the existence of the remedy, an awareness simply not possessed by many minors. In these circumstances, as the district court correctly noted, "[i]f she is uninformed in this regard [availability of a judicial remedy] the parents' de facto refusal

[12] The material parts of the text of the Illinois Abortion Parental Consent Act of 1977, Ill. Rev. Stat. ch. 38 §81-51 et seq. are as follows:

Section 4. No abortion shall be performed in this State if the woman is under 18 years of age and has not married except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;

(2) After the minor, 48 hours prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion; and

(3) After the consent of her parents is secured and certified in writing.

If one of the parents has died, has deserted his or her family, or is not available, consent by the remaining parent is sufficient. If both parents have died, have deserted their family, or are not available, consent of the minor's guardian or other person standing in loco parentis is sufficient.

If such consent is refused or cannot be obtained, consent may be obtained by order of a judge of the circuit court upon a finding, after such hearing as the judge deems necessary, that the pregnant minor fully understands the consequences of an abortion to her and her unborn child. Such a hearing will not require the appointment of a guardian for the minor. Notice of such hearing shall be sent to the parents of the minor at their last known address by registered or certified mail. The procedure shall be handled expeditiously.

becomes a de jure veto . . .'' *Wynn* v. *Scott,* 448 F. Supp. 997, 1004 (1978). Indeed, from a practical standpoint, the parental veto under this statute is the same as the veto struck down in *Planned Parenthood* v. *Danforth,* 428 U.S. 52 (1976).

The difficulties that a minor faces are not less formidable for one who is aware of the procedure. Even if aware, the minor is faced with the enormous burden of going to court, without legal assistance and in opposition to her parents' wishes. Many minors may simply not go to court and instead resort to an illegal or self-procured abortion.

In other medical situations where the wishes of the parents differ from the interests of the minor, the state, the physician or the hospital brings suit on behalf of the minor. *Custody of a Minor,* 1978 Mass. Adv. Sh. 2002. Defendants' expert, Dr. Rivkind, acknowledged that *''we* have had situations primarily in terms of blood transfusions, and *we* have had recourse to the court and requested the court to act as guardian for the minor'' (emphasis supplied) (2 App. 238) See *Jehovah's Witnesses* v. *King County Hosp.,* 278 F. Supp. 488 (W.D. Wash. 1967), *aff.* 390 U.S. 598 (1968) for discussion of court procedures for blood transfusions.

Furthermore, even the most expeditious proceeding will delay the abortion decision. The defendants have admitted that ''[t]ime, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months.'' (1 App. 401). They also admit that delaying the abortion decision or its effectuation can cause psychological and medical problems, especially as the minor approaches the end of the first trimester. (1 App. 408).

Delay of even a few days can make the difference in the medical risks of the abortion or may even mean that it may not be performed.

> ''[T]he delay involved in first trying to obtain parental consent followed by the delay inherent in any judicial proceeding is unreasonable. It might force the minor into either a second trimester abortion which is more dangerous and expensive or into not having an abortion at all if the second trimester has expired.'' *Wynn, supra,* at 1389.

Thus, the statute does ''impose burdens more serious than those suggested'' and ''create . . . interference with the doctor-patient relationship.'' *Bellotti,* 428 U.S. at 148.

B. *There is no state interest which §12(S) serves which is sufficiently significant so as to outweigh the minor's fundamental right of privacy.*

''[W]hen a State, . . . burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for accomplishment of some significant State policy requires more than a bare assertion, . . . that the burden is connected to such a policy.'' *Carey* v. *Population Services International,* 97 S.Ct. at 2022. In that case this Court struck down as unconstitutional a New York law prohibiting the distribution of non-prescription contraceptives to those under 16 years of age.[13] It is to be noted that the test for restrictions on minors' fundamental rights has been cast in different terms. ''State restrictions inhibiting privacy rights of minors are valid only if they serve

[13] The burden of proof is on the Appellants *See Planned Parenthood* v. *Fitzpatrick,* 401 F. Supp. 554, 563-4 (E.D. Pa. 1975) aff. 428 U.S. 901 (1976).

'any significant state interest . . . that is not present in the case of an adult.' *Carey*, 97 S.Ct. at 2021.

The Appellants have maintained that the State has several significant interests: Support of the family unit,[14] assurance that an abortion decision is guided by the parents in the minor's interest, and the health and welfare of youth. These are admirable goals. However, the evidence shows that the establishment of a requirement for parental consultation in *all* cases undermines, rather than supports, these interests.

The defendants admit that there are situations in which the parents of a pregnant minor would not be supportive, or in which parental involvement would be detrimental to the minor's best interest. (1 App. 402-403).

As the District Court noted, "[t]he state's power to limit this right [to abortion] should extend only to protect the minor from the special circumstances of her minority —immaturity, and the lack of informed understanding. Instead, the statute imposes upon the minor the very disability which has been found not to exist, and does so uniquely in the area in which the Court has determined she has Constitutional rights." *Baird* III at 1003.

The Appellants have argued that the purpose of the statute is to insure the minor makes a wise decision with an understanding of all the available options. In deciding that a Wisconsin statute which provides that parents having minor children not in their custody must obtain a court order granting permission to marry was unconstitutional, this Court found that:

> There is evidence that the challenged statute, as originally introduced in the Wisconsin Legislature, was intended merely to establish a mechanism whereby persons with support obligations to children from prior marriages could be counselled before they entered into new marital relationships and incurred further support obligations. Court permission to marry was to be required, but apparently permission was automatically to be granted after counselling was completed. The statute actually enacted, however, does not expressly require or provide for any counselling whatsoever, nor for any automatic granting of permission to marry by the court, and thus it can hardly be justified as a means for ensuring counselling of the persons within its coverage. Even assuming that counselling does take place—a fact as to which there is no evidence in the record—this interest obviously cannot support the withholding of court permission to marry once counselling is completed. *Zablocki* v. *Redhail*, ___ U.S. ___, 98 S.Ct. 673, 682 (1978).

Likewise, §12(S) does nothing to insure that any counselling by parents, judges or others will take place, and therefore it fails in the purpose Appellants have ascribed to it.

Due process requires that "[w]here certain 'fundamental rights' are involved, . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake . . ." *Roe* v. *Wade, supra*, at 155. This, §12(S) clearly does not do, and it is therefore unconstitutional.

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[14] As the Court said in *Poe* v. *Gerstein*, 517 F.2d 787, 794 (5th Cir. 1975), aff. 428 U.S. 901:

> "in the abortion context the requirement of parental permission is unlikely to achieve the state's aim of insuring the preservation of the family. If a minor's pregnancy has fractured the family structure, importation of a parental prohibition of abortion cannot reasonably be expected to restore the family's viability as a unit."

The prospect of a minor then suing her parents under the Massachusetts statute can do nothing but compound the family disruption. *Baird* III at 1002.

C. *The statute violates equal protection standards by singling out abortion as a procedure for which no minor alone can give consent.*

The Massachusetts Supreme Judicial Court has determined that the mature minor rule applies in the Commonwealth, in the absence of any statutory limitations. 1977 Mass. Adv. Sh. at 111. The District Court previously found that "a substantial number of females under the age of 18 are capable of forming a valid consent [to abortion]." *Baird* I at 855. Therefore, §12(S) as interpreted abrogates the common law right of these minors to give their informed consent to an abortion.

The distinction between consent procedures applicable to minors in the area of abortion and the consent required in regard to other medical procedures has been intensified by the enactment of the amended §12(F). See footnote 6. That section allows certain minors, including one who is a parent, is a member of the armed forces, is pregnant, or believes herself to be pregnant, or is living apart from his parents and managing his own financial affairs, to consent to their own medical and dental care, with the exception of abortion or sterilization services. It further allows married, widowed, or divorced minors to consent to any and all forms of medical care, including abortion without parental or judicial approval. See 1977 Mass. Adv. Sh. at 119.

The Appellees recognize that "not all distinctions between abortion and other procedures is forbidden . . . The constitutionality of such distinction will depend upon its degree and the justification for it." *Bellotti,* 428 U.S. at 149-150.

The distinctions made in Massachusetts are now multiple. A divorced minor may consent to abortion, while an unmarried minor may not. A minor who is pregnant

or believes herself to be pregnant may consent to all medical treatment except abortion and sterilization. A minor who is capable of giving informed consent to medical treatment may be treated without parental consent and without judicial interference, except when that medical treatment is abortion or sterilization.

Sterilization is fundamentally different from abortion. There are less drastic alternatives (contraceptives) to sterilization, while the alternatives to abortion are more dangerous, both physically and psychologically. Sterilization[15] is a permanent procedure, while abortion is of temporary nature since a minor can become pregnant in the future.

The minor who chooses to carry to term may receive all necessary treatment without the consent of her parents or any court.

> "Such a distinction is clearly inconsistent with *Roe* and *Doe* because this section of the Act singles out the abortion procedure as it applies to minors and places an extra layer of restrictions upon the effectuation of a minor's fundamental right to choose to have an abortion." *Planned Parenthood Ass'n* v. *Fitzpatrick,* 401 F.Supp. 554, 568 (E.D. Pa. 1975), *aff.* 428 U.S. 901 (1976). See also *Ballard* v. *Anderson,* 4 Cal. 3d 873, 484 P.2d 1345 (1971); *State* v. *Koome,* 84 Wash.2d 901, 530 P.2d 260 (1975).

The irrationality of the distinction is obvious when one realizes that the statutory scheme allows a minor to give

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[15] The appellants admit "(T)eenage motherhood involves a host of problems, including adverse physical and psychological effects upon the minor and her baby, the continuous stigma associated with unwed motherhood, the need to drop out of school with the accompanying impairment of educational opportunities and other dislocations including forced marriage of immature couples and the often acute anxieties involved in deciding whether to secure an abortion." (1 App. 406-407).

informed consent to major cardiac surgery, brain surgery, even a mastectomy, while denying her the opportunity for informed consent to the minor procedure of abortion.[16]

The *Wynn* Court found that in Illinois, like in Massachusetts,

> "a pregnant minor who chooses to give birth may consent to any medical or surgical treatment without the necessity of parental consent. Ill. Rev. Stat. ch. 91, § 18.1. That legislation presumes that pregnant minors are sufficiently knowledgeable and mature to consent knowingly. The State has suggested no reason why pregnant minors are less capable of deciding whether to terminate their pregnancy than they are to decide whether to carry their pregnancy to term, or even to have a Caesarian section, a far more dangerous procedure than a first trimester abortion. We hold, therefore, that the Act, at least in regard to the objective of informed decisions, is underinclusive because it includes mature and emancipated minors." *Wynn* at 1387.

No reason advanced by the Appellants can support these distinctions. Protection of the fetus has not been advanced as justification by the Appellants, nor could it be until the point of viability. *Roe* v. *Wade,* at 150-152, 163.[17] The other justifications raised would also apply to other medical or surgical procedures.[18] Yet only abortion has been

[16] Attention is called to the fact that a female at age 16 may legally consent to sexual intercourse (G.L. c. 265 §22A, 23, 24B). Additionally, a minor above the age of 12 must consent to his own adoption (G.L. c. 210 §2). Minors 14 or over may be tried for criminal offenses as adults instead of juveniles (G.L. c. 119 §61).

[17] §12S may also be overbroad in not distinguishing between trimesters.

[18] *Poe* v. *Gerstein,* 517 F.2d 787 (5th Cir. 1975) aff. 428 U.S. 901 (1976) sets forth various justifications at 792-794 and concludes that none of them "can meet the standard employed by *Roe*".

singled out. Therefore, the statute violates equal protection standards.

D. *The statute as interpreted employs a standard for parental and judicial consent that is vague and overbroad, so as to provide insufficient protection to a minor's right to privacy.*

The statute itself provides no explicit standard to be applied by a parent in deciding whether to consent to an abortion. The Supreme Court was clear that "(a)ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Danforth* at 75.

The Massachusetts Supreme Judicial Court construed the statute to mean that "so as to avoid any constitutional question, as far as possible, . . . the parent is to consider 'exclusively . . . what will serve the child's best interest.' " 1977 Mass. Adv. Sh. at 102.

However, parents cannot be charged with knowledge of this interpretation. The fact that the defendants ("the officials charged with enforcement of the statute", *Bellotti,* 428 U.S. 143) and a Senior District Judge (*Baird* I at 862-3) interpreted the statute to allow parental considerations other than the best interests of the minor, shows that the statute is easily misread. A parent may feel free to consider his/her religious beliefs, concern for the fetus or interest in the integrity of the family when deciding whether to give consent to the minor.

As in *Foe* v. *Vanderhoof,* 389 F.Supp. 947 (D. Colo. 1975), this statute violates the constitution by not specifying reasons for which consent may be withheld.

The defendants have admitted that "(s)ome parents of pregnant minors would under no circumstances consent

to an abortion." (1 App. 403-404). Other parents may withhold consent for various reasons unrelated to the minor's best interests. As the District Court said:

> "To have to go to court, in opposition to her parents' wishes, is a substantial burden on any minor. In this sensitive area, anything that needlessly and incorrectly increases the likelihood of this, imposes a burden that is constitutionally impermissible." *Baird* v. *Bellotti,* 428 F. Supp. 854, 856 (D. Mass. 1977) (*Baird* II).

The statute provides that if one or both the parents refuse consent, "consent may be obtained by order of a judge of the superior court for good cause shown . . ." The Supreme Judicial Court construed "that 'good cause' means that the judge may consent to an abortion where it is shown that, in spite of the disapproval of one or both parents, the best interests of the minor will be served if the abortion is performed." 1977 Mass. Adv. Sh. at 104.

Again there is no definition of the standard, no guidelines as to what should be considered. Furthermore, this determination has been entrusted to the Superior Court, which has not traditionally handled matters of this kind.[19]

The lack of explicit standards is even more serious since it allows a parent or a judge to override a minor's informed consent, made in conjunction with her physician's medical determination.[20] This veto power is clearly allowed under the statute:

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[19] G.L. c. 215 §§3 and 4 gives jurisdiction for custody matters to the Probate Courts. G.L. c. 208 §31 uses "best interests" standard for custody decisions.

[20] The medical judgment has already been made "in light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient." *Doe* v. *Bolton* at 192.

> "Unless a contrary conclusion is compelled constitutionally, we do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge must make a determination of those circumstances, but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him." 1977 Mass. Adv. Sh. at 104.

This vagueness and overbreadth fails to provide sufficient protection to a minor's right to privacy.

II. The District Court Did Not Abuse Its Discretion In Denying Appellants' Motion To Conduct a Survey of Massachusetts Health Care Providers.

On August 1, 1977 the Appellants filed with the District Court a "Motion for Leave to Contact Members of Plaintiff Class." This motion was denied on August 2, 1977 without explanation. It is the general rule that with regard to discovery matters there is broad discretion in the trial court, "and it is unusual to find abuse of discretion in these matters." *Swanner* v. *United States,* 406 F.2d 716, 719 (5th Cir. 1969).

In this Court's decision in the earlier appeal of this case it was said that, "the importance of speed in resolution of the instant case is manifest." *Bellotti,* 428 U.S. at 151. Discovery for the *Baird* III trial was commenced by the Appellants in February, 1977. Appellants availed themselves of all the usual discovery devices: interrogatories, depositions, requests for admissions. Since, over six months had passed since discovery had been commenced and trial was

imminent, the District Court's action was clearly justifiable.

Furthermore, the question of the practices of private health care providers has little relevance, if any, to the matters at issue in this case. Plaintiffs have asserted no claim that private physicians should be required to accept minor patients without consent. What plaintiffs do assert is the right of the minor and her physician to decide together what action is appropriate without undue interference from the Commonwealth. It is state action that this case is concerned with, not private action.

Lastly, it should be noted that Appellants could have diminished any prejudice they may claim from the denial of this motion by presenting evidence on consent practices at trial. Having failed to avail themselves of this opportunity, they cannot now be heard to claim a reversible error on this ground.

III. The District Court Properly Allowed Plaintiffs' Facial Attack.

Appellants claim that the District Court erred in having allowed plaintiffs to maintain a facial attack against §12S for reason that so-called "immature minors" were not represented before the three-judge court.

Some background is essential. Appellees have consistently approached §12S as including only mature minors within its scope.[21] The statute reads,

> "If the mother is less than eighteen years of age and has not married, the *consent of both the* mother and her parents is required". . . (emphasis supplied)

[21] Appellees have defined mature minors as those capable of giving consent under §12S. Immature minors are those minors incapable of informed consent. Presumably, Appellants agreed to these definitions (1 App. 419).

Applying the rule of statutory construction that all parts of a statute must be given meaning, Appellees concluded that §12S was intended to apply only to minors who had the capacity to consent. To read the statute otherwise, would ascribe to the words "the consent of . . . the mother" no meaning. *Mass. Commission Against Discrimination* v. *Liberty Mutual Insurance Co.*, 1976 Mass. Adv. Sh. 2403. In *Wynn, supra,* at 1390, the Seventh Circuit with regard to the Illinois parental consent statute found that, "the Parental Consent Act [is] deficient because it fails to provide for minors who do not understand the consequences of an abortion."

There are other difficulties which arise in reading the statute so as to include immature minors. In no other legal proceeding in the Commonwealth is an incompetent person required to file a complaint on his own behalf, without any guardian.[22] Where medical treatment is indicated for an incompetent individual, the usual practice is for the physician to seek judicial approval. As previously noted, where a physician deems medical treatment to be indicated and the parents object, it is the physician who initiates action. *Custody of a Minor, supra.* See also *Superintendent of Belchertown* v. *Sackewicz,* 1977 Mass. Adv. Sh. 2461. Surely, the legislature could not have meant that incompetent minors were to be required to go to Court on their own behalf.

For reasons unknown to the Appellees, Appellants failed to inquire about Plaintiffs' position on immature minors until the last day of the second trial. If the issue had been raised at an earlier point, resolution of the question as to the meaning of the statute could have been raised before the Supreme Judicial Court or the District Court. Appellants should be precluded by their own tardiness from

[22] See Rule 17 of the Mass. Rules of Civil Procedure and Rule 17 of the Mass. Rules of Domestic Relation Procedure.

raising this issue so late in the proceedings. Had appellees been aware of an issue regarding the inclusion or non-inclusion of immature minors at least prior to the second trial, there would have been an opportunity to present evidence specifically addressed to the problem.

However, the evidence introduced regarding the deleterious effects of the statute is sufficiently ample to support the conclusion that an immature minor would suffer a constitutionally unsupportable burden by the application of §12S to her situation.

The District Court rightfully disregarded Appellants' arguments that there are an insufficient number of cases for whom the statute would have an unconstitutional application to justify the enjoining of §12S, stating that "the exact number of minors who are injured is unimportant. Particularly is this so when there is no practical reason for not protecting them." *Baird* III at 1002. Finally, in analyzing Appellants' chart (see Brief of the Appellants Bellotti et al at 67), the three-judge court concluded that Appellants overlooked "the fact that a minor's possible need of an abortion without her parents' knowledge is not limited to the first trimester . . . and that the great majority of abortions occur in the earlier months." *Baird* III at 1001. In fact, third trimester abortions are seldom, if ever, performed by Massachusetts physicians (2 App. 589).

The Constitution protects individuals. *Eisenstadt* v. *Baird, supra.* If the Attorney General's argument is accepted, only those instances where a sufficient number of adversely affected individuals existed could there be an adjudication of constitutional issues. This certainly is not the law.

IV. The District Court Was Correct In Entering a Permanent Injunction and In Refusing To Rewrite the Statute In Question.

The Appellants suggest that the District Court should have rewritten §12S in such a way as to give it constitutional validity. In his Brief, the Attorney Geneal argued that, "the District Court abused its remedial powers by refusing to sever the statute's offending provisions, adopt a limiting construction, or enter an injunction no broader than required to vindicate its view of a minor's constitutional rights." Brief of the Appellants Bellotti et al at 58. Rightfully, the District Court declined to avail itself of this opportunity stating,

> (T)he Massachusetts court, in addition to contradicting its specific terms, suggests reading into the statute affirmative provisions made out of nothing but a generally announced purpose to pass constitutional muster. In so doing, the court seems to have found the ultimate remedy for all constitutional informities.
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> • • • •
>
> [I]f a statute which, in terms, requires parental consultation without exception, can be "construed to require as much parental consultation as is permissible constitutionally," here, at once, is an instant cure, both for overbreadth, and for lack of standards. Regardless of whether a statute says too much, or too little, so long as the legislatue intended it to be constitutional, when it comes before a court it will be appropriately rewritten. With due respect, we cannot believe this to be possible. *Baird* III at 1005-1006.

The District Court properly relied on this Court's decision in *United States* v. *Reese,* 92 U.S. 214 (1875). In

that case this Court was called to rule upon the issue of whether or not "a penal statute enacted by Congress . . . which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish . . . The question then to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only." *Id.* at 221.

This Court held that the function of the courts was to "enforce the legislative will when ascertained, if within the constitutional grant of power." *Id.* at 221. Otherwise, the courts must "annul" the legislative "encroachments." The majority wrote that "to make a new law . . . is no part of our duty." *Id.* at 221.

The Attorney General maintains that the holding in *Reese* has now been limited to situations in which "a criminal statute would necessitate such a revision of its text as to create a situation in which the statute no longer gave an intelligible warning of the conduct it prohibited." Brief of the Appellants Bellotti et al at 59. Assuming, *arguendo,* that the Attorney General is correct, §12S fits entirely within the scope of that limitation. §12S is a criminal statute. Mass. G.L. c. 112 §12Q mandates that the written consents required under §12S be delivered to the physician performing the abortion. Failure to obtain the consents of the proper persons can result in criminal sanctions under Mass. G.L. c. 112 §12T.[23]

Furthermore, the kind of massive revisions of §12S the Attorney General now seeks would cause the statute to have the same defects as the ordinance found void in *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162

[23] Violation of these statutes also jeopardizes a physician's right to practice medicine within Massachusetts. Mass. G.L. c. 112 §5.

(1972) for its failure "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, and because it encourages arbitrary and erratic arrests and convictions." The legislature has had in the past and will again in the future have ample opportunity to correct the constitutional defects of §12S. *Baird* III at 1004.

The Attorney General's reliance on *Griffin* v. *Breckenridge,* 403 U.S. 88 (1971) and *United States* v. *Raines,* 362 U.S. 17 (1960) is misplaced. In *Breckenridge* the statute in question was found constitutional as applied to the facts in the case. This case presents quite the opposite situation since the parties before this Court are the ones asserting the claim of unconstitutionality as applied to them. In *Raines,* the District Court dismissed an action for reason that the statute which the defendants who were public employees purportedly violated was unconstitutional since the statute could be applied to purely private action. This Court reversed, citing the rule that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might be also taken as applying to other persons or situations in which its application might be unconstitutional." *Raines* at 21. *Raines* again is clearly inapplicable to this case.

Other generally accepted rules of statutory construction and interpretation would be violated if the request of the Attorney General is followed. "In construing statutes courts must first look to the language of the legislation and if its language admits of no more than one meaning, the duty of interpretation does not arise." *United Shoe Workers of America, AFL-CIO* v. *Bedell,* 506 F.2d 174, 179 (1st Cir. 1974). When the provisions of a statute are clear and without ambiguity, there is no need for the courts to examine the statutory history or legislative intent. *Arkansas Valley Industries, Inc. Freeman,* 415 F.2d 713, 717

(8th Cir. 1969) §12S as construed by the Supreme Judicial Court is abundantly clear and unambiguous. Courts are not free to rewrite enactments of the legislature "to give effect to the judge's ideas of policy and fitness or the desirability of symmetry in statutes." *United States* v. *Shirah*, 253 F.2d 798, 800 (4th Cir. 1958).

The only justification for a judicial rewriting of a statute is if it is necessary "to avoid absurdity or frustration of the meaning and purpose of the statute." *Arkansas Valley Industries, supra,* at 718. That is clearly not the case here. The Attorney General suggests that by failing to revise the statute so as to make it constitutional the District Court has frustrated the expressed intent of the legislature to enact a constitutional statute.[24] This expression is however no more than an acknowledgment of the legislature's existing duty to abide within the Constitution, and as such is not a guide to the interpreting of §12S.

V. The District Court Properly Awarded Plaintiffs Their Costs, Including the Costs of Bellotti I Appeal.

The District Court, in *Baird* III at 1006, made an order that, "[p]laintiffs are entitled to costs, including recovery of costs paid as a result of the previous appeal lost because of defendants' mistaken advocacy." Earlier in its opinion, the three-judge court set forth in great detail the chameleon-like qualities of the defendants' position throughout the long course of this litigation.

At the first trial in the District Court (*Baird* I):

[24] The abortion related legislation of which §12S is a part was entitled "An Act to Protect Unborn Children and Maternal Health within Present Constitutional Limits". St. 1974, c. 706.

> ". . . defendants and all members of the court agreed that the statute recognized parents' rights as well as the minor's, and forbade any parent bypass."
>
> . . .
>
> On appeal to the Supreme Court defendants changed their position in a number of respects. They abandoned parents' rights; they asserted that parents must regard only the minor's interests in considering whether to consent, and asserted, further, that the statute permitted court poceedings without the parents' knowledge if in the minor's best interests. Finally, they agreed with our dissenting brother that the statute recognized the mature minor rule and that there could be no judicial override in such event."

On the basis of the representations of the Attorney General, this Court said:

> "The picture thus painted by the respective appellants is that of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from a statute that creates a 'parental veto.' " 428 U.S. at 145.

The Massachusetts Supreme Judicial Court, in its response to the questions certified to it by the District Court, took another view. See *Baird* v. *Attorney General*, 1977 Mass. Adv. Sh. 96, 360 N.E. 2d 288 (1977).

> "The Massachusetts court determined that the legislature was 'explicit in stating that a judge should pass on an application for a consent order only after one or both parents have declined to consent to the abortion.' N.E. 2d at 294. Faced with the loss of this alleviating feature, defendants now take the position that there are not enough cases calling for an exception to mandatory consultations." *Baird* I at 1000.

The defendants' attempt to excuse these vacillations as being attributable to a change during the course of litigation in the incumbent holding the office of Attorney General. F.R. Civ. P. 25(d)(1) provides in part that:

> "When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party."[25]

Therefore, since it is the office of Attorney General who is the defendant and not the particular individual who holds the office, Appellants cannot rely on any change in officeholder to justify the extra burden which plaintiffs have had to bear because of their shifting positions.

Appellants further rely on Mass. G.L. c. 112 §3 which obligates the Attorney General to appear in all suits in which the Commonwealth is a party or has an interest. However, it is the Attorney General who determines the manner in which this litigation is carried out and who has ultimate control over the litigation. In *Feeney* v. *Commonwealth*, 1977 Mass. Adv. Sh. 1959, 366 N.E. 2d 1262 (1977), the Supreme Judicial Court determined that the Attorney General could prosecute an appeal from the District Court to this Court over the objections of the state officers

[25] Rule 25(d)(1) of the Massachusetts Rules of Civil Procedure is identical to the Federal Rule.

whom he represented. The Attorney General also has the power to decide not to take an appeal when the public officer he represents wants an appeal prosecuted. *Secretary of Administration and Finance* v. *Attorney General*, 367 Mass. 154, 326 N.E. 2d 334 (1975). The only limits placed on the Attorney General are a "common law duty to represent the public interest . . ." 366 N.E. 2d at 1266, and a requirement that his powers ". . . may not be used in an arbitrary, capricious or illegal manner . . ." *Id.* at 1267.

With so much control over litigation affecting the public interest, it would seem incumbent upon the office of the Attorney General to formulate consistent policies with regard to the litigation in which it is engaged. In other words, if the Attorney General does not know what his own clients (i.e., the legislature) had in mind, how can the plaintiffs, the classes they represent, the Courts or the general public? If the Attoney General had maintained a consistent position throughout, much of this lengthy litigation, namely the second District Court trial and the second appeal to this Court, might easily have been avoided. Plaintiffs should not be expected to share the costs of the unnecessary prolongation of this litigation, and, therefore, the District Court order for costs should be affirmed.

Conclusion

For the reasons set out in this brief, the Court should affirm the judgment of the District Court and award costs to Appellees.

Respectfully submitted,

JOSEPH J. BALLIRO
JOAN C. SCHMIDT
LAW OFFICE OF JOSEPH J. BALLIRO
One Center Plaza
Boston, Mass. 02108
(617) 723-1980
Attorneys for Appellees

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FOR ARGUMENT

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Supreme Court of the United States.

October Term, 1978.
Nos. 78-329, 78-330.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS, AND
JANE HUNERWADEL,
INTERVENOR-APPELLANT,
v.
WILLIAM BAIRD, ET AL.,
APPELLEES, AND
PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, CRITTENTON HASTINGS HOUSE & CLINIC AND
PHILLIP G. STUBBLEFIELD, M.D.,
INTERVENOR-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Brief for Intervenor-Appellees.

Of Counsel:
LOYD M. STARRETT
LAURA R. HANDMAN,
10 Post Office Square,
Boston, Massachusetts 02109.

JOHN REINSTEIN,
Civil Liberties Union of Massachusetts,
68 Devonshire Street,
Boston, Massachusetts 02109.

JOHN H. HENN,
SCOTT C. MORIEARTY,
SANDRA L. LYNCH,
FOLEY, HOAG & ELIOT,
10 Post Office Square,
Boston, Massachusetts 02109.
Attorneys for Intervenor-Appellees

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IN THE

Supreme Court of the United States.

October Term, 1978.

Nos. 78-329, 78-330.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS, AND
JANE HUNERWADEL,
INTERVENOR-APPELLANT,
v.
WILLIAM BAIRD, ET AL.,
APPELLEES, AND
PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, CRITTENTON HASTINGS HOUSE & CLINIC AND
PHILLIP G. STUBBLEFIELD, M.D.,
INTERVENOR-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Brief for Intervenor-Appellees.

Prior Opinion and Opinions Below.

This case[1] was previously before this Court and remanded to the district court on abstention grounds. *Bellotti* v. *Baird*, 428 U.S. 132 (1976) (*Bellotti I*).

[1] Nos. 78-329 and 78-330 are appeals from the same decision below, have been ordered consolidated by this Court, and are treated in this Brief as one case.

The district court initially declared unconstitutional a Massachusetts statute, now § 12S (formerly § 12P) of chapter 112 of the Massachusetts General Laws, as well as portions of other statutes which referred to it, and enjoined enforcement thereof; its opinion is dated April 28, 1975 and reported at 393 F. Supp. 847 (D. Mass. 1975) (1 App. 499). On July 1, 1976, this Court vacated the district court's order and remanded the case for further proceeding, including certification of appropriate questions concerning the meaning of the statute to the Massachusetts Supreme Judicial Court. 428 U.S. 132, 151-152. (Enforcement of the statute was stayed without opinion. 429 U.S. 892 [1976].)

The district court certified questions to the state court on August 31, 1976 (1 App. 23), and the state court's answers appear in an opinion dated January 25, 1977 and reported at Mass. Adv. Sh. (1977) 96, 360 N.E. 2d 288 (1 App. 531).[2] Upon consideration of the state court's answers, the district court stayed enforcement of the statute *pendente lite* in an opinion dated February 10, 1977 and reported at 428 F. Supp. 854 (D. Mass. 1977) (1 App. 610). After a further trial, the district court declared unconstitutional the statute as constructed by the state court, as well as portions of other statutes which referred to it, and enjoined enforcement thereof; its opinion is dated May 2, 1978 and reported at 450 F. Supp. 997 (D. Mass. 1978) (1 App. 640).

Jurisdiction.

This case was brought on October 30, 1974, and a three-judge district court was convened on November 6, 1974 under 28 U.S.C. §§ 2281, 2284, as then in effect (1 App. 2).

[2] The decision is not yet published in the Massachusetts Reports, and therefore, is hereinafter cited only to the Northeastern Reporter.

The district court's opinion and order which are the subject of this appeal are dated May 2, 1978 (1 App. 64-65). Appellants and intervenor-appellants claimed their respective appeals pursuant to 28 U.S.C. § 1253, and this Court noted probable jurisdiction on October 30, 1978. 47 U.S.L.W. 3292-93 (Oct. 31, 1978).

Statutes Involved.

In 1974, the Massachusetts legislature, over the governor's veto, passed "An Act to protect unborn children and maternal health within present constitutional limits."[3] This Act added certain new sections to chapter 112 of the Massachusetts General Laws. The principal section (sometimes referred to in this Brief as "the statute") which was declared unconstitutional by the district court is § 12S:

> § 12S. If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died, or have deserted their family, consent of the mother's guardian or other persons having duties similar to a guardian, or any person who has assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physi-

[3] 1974 Mass. Acts c. 706; the sections were relettered and corrective references inserted by 1977 Mass. Acts c. 397.

cian performing the abortion who shall maintain it in his permanent files.

Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent for the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve U.

The district court also declared unconstitutional such other portions of chapter 112 as make reference to § 12S. Section 12Q makes all non-emergency abortions subject to § 12S. Violations of § 12Q are made criminal by § 12T and punishable by a fine of not less than $100 nor more than $2,000. Section 12U permits the state attorney general or any person whose consent is required to petition the state superior court for an order enjoining the performance of any abortion which would be performed contrary to § 12S.

Questions Presented.

1. Whether the district court erred in holding that the consent provisions of Mass. G.L. c. 112, § 12S (a) unduly burden a mature minor's constitutional right to decide whether to terminate her pregnancy, or (b) unjustifiably discriminate against a minor's constitutional right to decide whether to terminate her pregnancy.

2. Whether the district court erred in invalidating the statute on its face.

3. Whether the district court erred in its refusal to adopt savings constructions contrary to the statutory constructions in the state court's answers to certified questions.

4. Whether the district court committed reversible error (a) in its pre-trial procedural discovery order denying defendants-appellants' August 1, 1977 motion for leave to

contact members of the plaintiff class in order to conduct a survey of health care provider consent practices, or (b) in its post-trial order allocating certain litigation costs.

Statement of the Case.

PROCEEDINGS BELOW.

Four teenage women, their physician, an incorporated family planning clinic and the director of the clinic brought this class action in the district court in October, 1974 challenging on constitutional grounds a Massachusetts statute (Mass. G.L. c. 112 § 12S [formerly § 12P] in particular) which restricted the rights of minors to obtain abortions. 1 App. 1. The Massachusetts Attorney General and others were named as defendants (1 App. 85) and Jane Hunerwadel, a parent, was allowed to intervene as a defendant representative of the class of Massachusetts parents having unmarried minor daughters. 1 App. 5; *Baird* v. *Bellotti*, 393 F. Supp. 847, 849-850 (D. Mass. 1975) (*Baird I*). In 1978 the district court permitted post-judgment intervention on plaintiffs' side by intervenor-appellees, Planned Parenthood League of Massachusetts and Crittenton Hastings House & Clinic, organizations which provide counseling to pregnant adolescents, and Phillip G. Stubblefield, M.D.[4]

The case was first tried in 1975. After hearing several days of testimony, a majority of the three-judge district court found the statute to be unconstitutional and permanently enjoined its enforcement. *Baird I, supra,* 393 F. Supp. 847.

In its opinion, the district court also found that one of the plaintiff minors ("Mary Moe I"), her physician, and

[4] Prior to their intervention, these parties had been accorded a special stature more than that of an amicus. *Baird* v. *Bellotti*, 450 F. Supp. 997, 999 n.3, 1001 n.6 (D. Mass. 1978).

the family planning clinic had standing, for the party plaintiffs, and Jane Hunerwadel had standing, for the intervening defendant parents, as "adequate class representatives," and certified the classes "as to all." *Baird I* at 852. In particular, Mary Moe I was found to have standing to represent the class of unmarried minors "who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents." *Id.* at 850. The physician and family planning clinic were held to "have standing to attack the statute as applied to *all* minors, at least insofar as it requires the consent of both parents."[5] *Id.* at 852 (emphasis added). As all minors were before the court, and as the district court specifically held that "[t]he statute . . . applies to all minors" (*Baird I* at 855), the district court's declaration of the statute's unconstitutionality was not limited to any subclass of those to whom it applied. 1 App. 13-14.

At the first trial, appellants had made representations to the district court as to the meaning of several provisions of the statute. *Baird I* at 855. On appeal to this Court, appellants, inconsistently with those representations, argued that ambiguity in the meaning of those same provisions permitted a construction of the statute which might obviate or modify the constitutional question presented. Relying upon those arguments of ambiguity, this Court vacated the decision below, ordered abstention, and directed the district court to certify questions about the meaning of § 12S to the Supreme Judicial Court of Massachusetts. *Bellotti I*, 428 U.S. 132. A single justice of this Court stayed the enforcement of the statute pending a response to certified questions, and this Court summarily denied an application

[5] As the state court subsequently construed the statute, it requires parental notice in every case, including the case where notice is against a minor's best interests. This requirement affects "mature" and "immature" minors alike.

to vacate that stay. 429 U.S. 892 (1976). The district court certified a series of nine questions to the Supreme Judicial Court, which heard arguments and received briefs from persons who are parties here.

The decision of the Supreme Judicial Court, *Baird* v. *Attorney General*, 360 N.E. 2d 288 (1977) (*Attorney General*), rejected many of the interpretations of the statute proffered by appellants to this Court and to the state court. Appellants had contended: 1) that because of the Massachusetts "mature minor" rule, a minor who was "determined by a court to be capable of giving informed consent [to an abortion] will be allowed to do so [without judicial override of her decision]", *Bellotti I*, 428 U.S. at 144; 2) that "a mature minor capable of giving informed consent [may] obtain . . . an order permitting the abortion without parental consultation", *id.* at 145; and 3) that "even a minor incapable of giving informed consent [may] obtain an order without parental consultation where there is a showing that the abortion would be in her best interests", *id.* The state court rejected each of these interpretations. The state court held that the statute requires all minors (unless married or previously married) to obtain the written consent of both parents to an abortion and, should either parent not consent, to obtain the consent of a superior court judge based on his view of her best interests. In particular, the state court held that the statute mandates parental consultation in all cases, including cases where a mature minor has given an informed consent and cases where the state superior court judge would find that parental consultation is contrary to the best interests of the minor. *Attorney General* at 296-297.

The state court held that the issue before the superior court judge is not whether the minor is capable of giving an informed consent, but whether, in the judge's view, an

abortion is in the best interests of the minor. *Id.* at 293. The superior court judge, thus, may override the informed consent of a mature minor. The state court held that the burden is on the pregnant minor to commence the judicial proceeding and obtain consent of the superior court judge, and that the parents must be named as defendants and given notice of the superior court proceedings and an opportunity to contest. *Id.* at 297, 298.

In its opinion, the state court also said that, if any of its interpretations of the statute did not meet constitutional standards, then it meant to interpret the statute in any way which did meet those standards:

> If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation. *Attorney General* at 292.

With such guidance as to the precise meaning of the statute, the case was returned to the district court.[6]

Upon receipt of the state court's answers, and after hearing, the statute was stayed. *Baird* v. *Bellotti,* 428 F. Supp. 854 (D. Mass. 1977) (*Baird II*). Further discovery commenced on February 22, 1977 (1 App. 29), and extensive discovery followed (*see* 1 App. 29-55). Hearings were held on April 5 and 13, and the parties were directed to meet concerning discovery and deposition schedules (1 App. 32, 34). Appellants filed an extensive "Initial

[6] The state court delayed transmittal to the district court of an attested copy of its opinion in order to give the district court time to enter any appropriate interlocutory order. *Attorney General* at 303. The state court considered it the province of the district court "to determine the Federal constitutional issue." *Attorney General* at 291.

Statement of Disputed Material Facts" on April 12. 1 App. 33. On July 13, 1977, the district court ordered that a pretrial conference be held on August 22, 1977, and that "all pre-trial discovery will be completed by Friday, August 19, 1977."[7] 1 App. 41-42. The district court allowed appellants to take the depositions of plaintiffs' experts. 1 App. 43. Thereafter, on August 1, 1977, appellants filed a motion for leave to contact members of the plaintiff class to conduct a survey of health care provider consent practices. 1 App. 44, 282. The district court unanimously denied that motion.

After evidentiary hearings in October, 1977, the district court held the statute to be unconstitutional, one judge dissenting in part. *Baird* v. *Bellotti,* 450 F. Supp. 997 (D. Mass. 1978) (*Baird III*). That decision is the basis for the instant appeals.

In the opinion by Senior Circuit Judge Bailey Aldrich, the district court found the statute to be unconstitutional because its absolute requirement of parental consultation placed an improper burden on the right of a minor ("mature" or "immature") to decide whether to continue or terminate her pregnancy (*Baird III* at 1000-1003); and its rejection of the mature minor rule as to abortions placed on the mature minor "an undue burden in the due process sense" and constituted "a discriminatory denial of equal protection." *Baird III* at 1003-1004. The court also found that, as a practical matter, the broad language of the statute improperly suggested to parents that they were free to include considerations, such as their own interests, other than consideration of the minor's best interests in deciding whether they would consent to an abortion, thus unnecessarily increasing the "incidence of

[7] This Court had previously observed in July, 1976 that "[t]he importance of speed in resolution of the instant litigation is manifest." *Bellotti I* at 151.

improper refusals" (*Baird III* at 1004) — and, by implication, the incidence of occasions when a minor would have only the choice of abandoning her abortion decision or of confronting her parents in court. Finally, the district court declined to rewrite the statute. *Id.* at 1005-1006.

Statement of Facts.

In *Baird I* and *Baird III* the district court made extensive findings of fact with respect to the central issue in this case: the effect of the statute on females under age eighteen, were it permitted to be enforced.[8] None of these findings has been challenged as clearly erroneous. These findings, read in the light of related undisputed evidence, establish, contrary to appellants' and intervenor-appellant's suggestions, that the statute will impair maternal health rather than benignly protect it and will impede intra-family communication rather than promote it.

These findings and related evidence fall naturally into three headings: (1) a description of the minors affected by the statute and their ability to give informed consent to terminating their pregnancies; (2) a description of the burdens imposed by the statutory scheme; and (3) a description of the consequences for minors of following the statutory scheme.

1. *The Minors Affected and Their Ability to Give Informed Consent.*

The district court did not make quantitative findings on the numbers of minors affected by the statute, but these data are largely available in admissions or other uncontroverted evidence. In Massachusetts, there are approx-

[8] The findings in *Baird I* are incorporated by reference in *Baird III*. *Baird III*, 999 n.2.

imately 454,000 female minors ages 10 through 17, 1 App. 155 (admissions), of whom many are obviously beyond puberty. Like teenagers elsewhere, many have sexual experiences and many become pregnant. 1 App. 157 (admissions); App. Exhibit 2, 9, 10.[9] Two-thirds of all teenage pregnancies and one-half of the births are unintended.[10] *Id.* at 16. Ninety percent of the pregnancies each year among unmarried 15- to 19-year-olds are unintended. *Id.*

Many of these teenagers will decide to terminate their pregnancies. Nationally, about 95 percent (270,000) of the teenagers who so decide are age 15 to 19 and the remaining 5 percent (13,500) are under 15. 1 App. 157-158 (admissions). (That 95 percent is comprised of 50 percent age 18-19 and 45 percent age 15-17. 1 App. Exhibit 2, 48.) Massachusetts statistics should be similar. 1 App. 159-160 (admissions). In Massachusetts, 91 percent of all abortions are performed within the first trimester. 1 App. 156 (admissions).

[9] Exhibit 2 in the district court, *11 Million Teenagers*, The Alan Guttmacher Institute, Planned Parenthood Federation of America (1976), was designated as part of the Appendices herein. To avoid difficulties in reproduction or reprinting, and at the suggestion of the clerk's office, copies have been filed with this Court separately, rather than being reprinted in a folio-sized appendix.

Admissions cited herein were admitted in evidence.

[10] These pregnancies result largely from failure to use contraceptives, and largely because of ignorance about them or lack of access to them. App. Exhibit 2, 30. This was the case here with plaintiff Mary Moe. *Baird I* at 850. However, common contraceptive measures may pose special risks for teenagers. Oral contraceptives may accelerate physical maturation and affect ultimate stature and may inhibit initiation of regular ovulation, thus reducing fertility; IUDs are less effective in teenagers because of higher expulsion rates. U.S. Department of Health, Education and Welfare, Office of Child Health Affairs, "Teenage Pregnancy" (December, 1976), 8.

National statistics show that approximately three-fourths of the pregnancies legally terminated by teenagers under age 18 were terminated by teenagers age 16 and 17.[11] The district court made specific findings with respect to the capacity to give informed consent of this 16- and 17-year-old group. "[M]any, perhaps a large majority of 17-year olds are capable of informed consent, as are a not insubstantial number of 16-year olds, and some even younger." *Baird III* at 1001. Minors appear to have a better appreciation of the consequences of having an abortion than of having a child. 2 App. 58.

2. *The Burdens of the Statutory Scheme.*

A. Parental Notice and Consent.

The district court made specific findings concerning the burden of obtaining parental consent (or notifying parents) in every case. Pregnancy in an unmarried minor is a period of great emotional stress, but while most parents probably are supportive, "an appreciable number are not". *Baird I* at 853. The court further found that "a significant number of minors who are capable of consenting are unwilling to tell their parents either because they *correctly* fear what would happen to themselves" or they know that their parents would "under no circumstances consent" or would "attempt to make them enter into a marriage they do not want." *Id.* at 853 (emphasis added). Some parents would even "insist upon the continuance of the pregnancy simply as a punishment, or to teach a

[11] A 26-state survey of reported legal abortions obtained by teenagers appears at Table 6A, U.S. Department of Health, Education and Welfare, Center for Disease Control, "Abortion Surveillance 1976" (issued 1978; HEW Publ. No. CDC 78-8205). Of abortions obtained by teenagers under 18 (81,829), 42.4 percent (34,711) were by minors age 17, and 31.6 percent (25,792) were by minors age 16.

lesson." *Id.* at 854. The personal beliefs of many parents further aggravate the problem of obtaining consent:

> Of unquestionable numerical importance, we cannot overlook the fact that many parents believe with total sincerity that abortion is morally impermissible, either under all circumstances or unless to save the life of the pregnant woman. *Baird I* at 854.

In its supplementary findings in *Baird III*, the district court found that "there are a variety of recognized reasons" why it may be in a minor's best interests for "one or both of her parents" not to be informed, including possible injury to the parents by the shock of the information and resultant feelings of guilt in the minor; the reaction of "[s]ome parents [who] are child abusers" or "at least may become actively hostile"; and the reaction of "parents who would insist on an undesired marriage or on continuance of the pregnancy as punishment." *Id.* at 1001. "We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court. This would seem but a normal reaction of persons who hold strong anti-abortion convictions." *Id.* at 1001. The district court also accepted appellants' own observation in their brief to the district court that the statute reflects "'legislative recognition of the unfortunate fact that parents are not always supportive of their pregnant daughters and may, the evidence suggests infrequently, refuse to consent to the performance of abortion surgery although the surgery is in their child's best interests, or mistreat her in other ways.'" *Id.* at 1002.[12] Not surprisingly, the dis-

[12] The harm from requiring consent or consultation with the "appreciable number" (*Baird III* at 1001; *Baird I* at 853) of non-supportive parents can occur with respect to abortions in any trimester. *Baird III* at 1001.

trict court also found that the "immature minor" may, in fact, be the "least capable of dealing with a hostile family situation." *Id.* at 1001. The plaintiff Mary Moe [I] herself, who was sixteen years old, testified that she did not want to tell her parents because she felt certain, based on remarks made by one of her parents in connection with the pregnancy of a friend, that this parent would take physical action against the boy involved. *Baird I* at 850. Of course, sometimes such fears are based on parental "threats that they do not mean, or would not carry out", but the threats themselves "nonetheless serve to destroy intercommunication." *Baird* I at 853.

The district court also made specific findings concerning the separate and distinct burden of obtaining *both* parents' consent in every case. The burden is especially acute in the case of the "immature minor" (the minor incapable of giving informed consent), for whom a valid consent by someone is required. The district court found that the Massachusetts custom and practice with respect to medical treatment for an immature minor was to proceed with the consent of *one* parent. *Baird I* at 852, 855. The "variety of recognized reasons" for bypassing parental consent or notice in some cases applies with respect to "*one or both*" of the parents. *Baird III* at 1001 (emphasis added). As one expert put it, without contradiction, "we often see a mother come in with a teenager saying, 'don't let my husband know about it because he'll kill her'." 2 App. 148. If that one parent has not consented, the minor must proceed to court under the statutory procedure.

B. Court Proceedings.

As the district court found, "the burden [on the minor] of seeking a court order [to allow her to have an abortion]

— is a heavy one." *Baird III* at 1001. The expert testimony (found credible and uncontradicted by the district court, *id.* at 1001) was that "court proceedings . . . even if conducted in the most benign manner, would be 'severely detrimental to a teenager, particularly since she has just met with her parents' disapproval,' . . . ." *Id.* at 1001. *See* 2 App. 295-296, 422.

If the minor were to bring judicial proceedings against one or both parents to overturn a refusal to give consent, she would encounter a number of practical difficulties. These include the absence of specific court rules for such proceedings; the difficulty of a poor minor in obtaining legal guidance for the stages of litigation prior to court-appointment of a lawyer; the risk of delay [13] arising from the absence of any court sessions or judges whatsoever in certain superior court courthouses at various times of the year and the possibility of having to appear for two hearings rather than one; and the simple fact that the minor must disclose her out-of-wedlock pregnancy and dispute with her parents to strangers (a clerk, a judge, a court reporter). (Additional facts are set forth, post, in Argument I D.)

But assuming a minor were to succeed in bringing judicial proceedings and obtaining a decision, the consequences to her, whatever the result, were found by the district court to be severely harmful. If the minor loses, it is obviously "a personal blow, and scarcely a redemption of the ill feeling and tension [between minor and parents] that undoubtedly resulted from her parents' re-

[13] The district court found that, as the minor reaches the end of the first trimester, the medical and psychological risks involved require that the abortion decision be made "as soon as possible." *Baird I* at 853; *see* 1 App. 401 (admissions). *See also* U.S. Dept. of HEW, "Abortion Surveillance," *supra*, n.11, at 7 (mortality rate for abortion increases "40%-60% for each week of delay after the 8th week").

fusal of consent and her taking them to court." *Baird III* at 1002. Indeed, as to the mature minor, it is "highly traumatic . . . to be refused a desired abortion." *Baird III* at 1003. Yet if the minor "wins" in her suit against her parents, the district court, crediting the testimony of appellants' own expert, found that "she is likely to find herself in an even worse position." *Baird III* at 1002. The testimony of this expert, Dr. Sprague W. Hazard, was quoted in part by the district court (*Baird III* at 1002 n.7), but his full testimony, in response to questions by appellants' counsel as to the consequences of court proceedings, bears setting forth here.

> A. It seems to me that when affairs have reached this point where the relationship between the parents and the child have become a courtroom issue that I would have a lot of misgivings about the validity of the relationship between the parents and the child and how capable they are of being valid support for this child in the future.
>
> It seems to me that the lines have been drawn in a way that are not productive as you have stated them. My opinion is that the adolescent child should have certain rights about her life and her body and what happens to it and this should be taken into consideration at that time.
>
> Q. Assuming that those issues were taken into consideration, Doctor, that is to say the judge was quite concerned with the adolescent's rights and what would be in her best interests and how to advance those best interests, do you have an opinion as to what the consequences for that kind of procedure might be for the adolescent?
>
> A. The consequences, if the decision was made in favor of the child for quality family relationships are not good. The need for support on the part of the child would be abandoned at this point and the child would be abandoned at this point and her need for support would be great and again hopefully circumstances could be developed whereby those kinds of supports could be developed.
>
> Q. Will you tell us, Doctor, the basis of your concern for the lack of support for the child, why you feel the child would lose support?
>
> A. It would be my estimate that a family had been unable to resolve this except to go to a court setting were trying to express other rights on their own rather than take into consideration the whole needs of the child.

2 App. 423-428.

3. *The Consequences of the Statute for Minors.*

The obvious consequence of the statute for minors is that it reduces the availability to them of legal abortions in Massachusetts. Because of the burdens of the statutory procedures, many minors, as the district court found, would simply refuse to try to obtain a legal abortion in Massachusetts if it meant compulsory notification of both parents or suing them in court. "[A] significant number of minors . . . are unwilling to tell their parents" because of correct fears or knowledge about their likely reaction. *Baird I* at 853. "[A] substantial number of minors would refuse to consult with their parents under any circumstances." *Baird III* at 1001 (noting testimony of appellants' expert).[14] Appellees' expert "credibly testified that

[14] This testimony appears at 2 App. 415, where the witness accepted the word "refuse". *Compare Baird III* at 1010 n.4 (dissenting opinion arguing that witness only used word "reluctant").

many minors would not go to court, especially if it had to be against her parents, but rather would resort to illegal and frequently dangerous abortions."[15] *Baird III* at 1001-1002. That expert also testified that some minors would go to another state which did not have parental/judicial consent requirements.[16]

> [Teenagers will avoid these requirements by] going out of state, by attempting abortions themselves or finding non-medical means of obtaining abortions be it friends or people in the community who are known to provide the services rather than, one, confront their parents, and two, confront any other authority about the problem.

2 App. 300.

The effect of reducing the availability of legal abortions is, of course, that many minors will simply give up and have an unwanted baby (possibly with an "undesired marriage"[17]). This will be especially true for the immature minor — the minor "least capable" of dealing with parental opposition. *Baird III* at 1001.

[15] Another alternative which some may choose is suicide. There is a relatively high risk of suicide among unmarried minors who become pregnant during adolescence. U.S. Dept. of HEW, "Teenage Pregnancy," *supra*, n.10 at 7. *See* 2 App. 314-315 (greater psychological problems among unmarried minors who continue a pregnancy than among those who terminate it).

[16] "Teenagers in this situation are apt to and have in the past sought to obtain an abortion by means that they may see as less difficult for them and those means may in fact be more dangerous to them ultimately." 2 App. 299.

As to the burdens and deterrent effect of travel, especially for unmarried black minors, *see* Shelton, et al., *Abortion Utilization: Does Travel Distance Matter?*, 8 Family Planning Perspectives 260, 262 (1976). *See also* App. Exhibit 2, 50 (need to travel reduces abortion use).

[17] *Baird III* at 1001. Sixty percent of premaritally pregnant mothers aged 17 or younger who marry are separated or divorced within six years. App. Exhibit 2, 28.

The consequences for a minor of being compelled to bear an unwanted child are grave. First, as the undisputed evidence indicated, the minor faces severe adverse social consequences from an unwanted pregnancy. "Teenage motherhood involves a host of problems, including adverse physical and psychological effects upon the minor and her baby". 1 App. 406 (admissions). For female teenagers, pregnancy is the most common cause for quitting school; eight out of ten women who become mothers at age 17 or younger never complete high school. App. Exhibit 2, 25. Accordingly, "teenage mothers are less likely to work and more likely to be on welfare than mothers who first give birth in the 20's." *Id.* at 26. In one New York study, "seventy-two percent of mothers who first gave birth at ages 15-17 were receiving welfare, a rate 4.6 times that of women who first gave birth at ages 20-24." *Id.* This accords with statistics showing a correlation between early pregnancy and poverty — the younger the woman at first birth, the poorer the family. *Id.* at 27.[18]

The consequences for the minor's health of being compelled to bear a child are equally grave. The district court expressly found that the evidence in this case supported this Court's prior conclusion in *Roe* v. *Wade*, 410 U.S. 113 (1973) that "continued pregnancy and childbirth

[18] Although the district court did not address the matter of the consequences for the baby of a teenager who carries her pregnancy to term, the evidence was not disputed that such a baby faces more risks than babies of older women. App. Exhibit 2, 22. For example, if the teenager is 15 or under, the chances are more than twice as high that the baby will die. *Id.* Similarly, babies born to teenagers are "much more likely to be premature or of low birth weight" than babies of older mothers; and low birth weight is a major cause of infant mortality, illness, and birth injuries such as neurological defects which may involve lifelong mental retardation. *Id.*

involve greater medical and psychological risks than a properly performed first trimester abortion." *Baird III* at 1004. "The same comparative findings . . . apply to psychological risks as to physical." *Id.* For minors, the risks of childbirth are even greater than for adults. "The death rate from complications of pregnancy, birth and delivery is 60 percent higher for women who become pregnant before they are 15 . . . [and] for 15-19 year olds is 13 percent greater than for mothers in their early 20's." App. Exhibit 2, 23. Adolescent mothers are also "more likely to have complications during labor or as a result of premature birth." *Id.* Additionally, "pregnancy among very young teenagers depletes the nutritional reserves needed for their own growth and places them at higher risk for a variety of ills." *Id.* at 23.[19] It is these "young teenagers," teenagers who will likely be "immature" minors, who are most at risk from being forced to have a baby. Yet under the statute, it is these minors who can most easily be forced to do so.

In summary, the consequences of the statute in fact would be to make legal abortions more difficult to obtain, to deter pregnant minors from attempting to obtain them, and to force pregnant minors to have unwanted children.

Summary of Argument.

The district court correctly concluded that the statute was unconstitutional in placing undue burdens on a minor's right to decide in favor of having an abortion. As construed

[19] According to a publication of the Public Health Service, "the average age of menarche is 12.5 years, and girls' average age for complete physical maturity is several years later." U.S. Department of Health, Education and Welfare, Public Health Service, "Approaches to Adolescent Health Care in the 1970s" at 17 (issued 1975; HEW Publ. No. HSA 75-5014.)

by the state court, the statute may not be viewed as a benignly neutral aid to a minor's decision-making. Its burdens of notice to both parents in every case, judicial proceedings, and possible judicial veto of a mature minor's decision are imposed only when a minor decides to terminate her pregnancy, and never when she decides to continue it. Indeed, by its enactment of a statutory mature minor rule (Mass. G.L. c. 112, § 12F) applicable to every kind of medical treatment other than abortion or sterilization, the state has excused a minor who decides to continue a pregnancy from any kind of parental or judicial involvement with respect to treatment of her pregnancy or any other medical problem. (Pages 26-29.)

Due Process Burdens

The undue burdens imposed by the statute are several. *First*, the minor who wishes to terminate her pregnancy must obtain both parents' consent, or notify both of them of a judicial hearing. Notice must be given in every case, and may not be bypassed either in the circumstance when a mature minor has given informed consent or in the circumstance when notice would be against the best interests of the minor (mature or immature). Independent assessment by a physician or even a judge of whether notice to both parents would be in the minor's best interests is forbidden. The both-parent notice requirement also exceeds without justification the Massachusetts medical practice and custom of treating minors upon the consent of one parent, and, in addition, exposes immature minors to the separate burden of notifying a second parent even when one parent has consented and the notice would be contrary to the minor's best interests. (Pages 29-36.)

Second, the statute imposes a "judicial override" provision that permits a judge to veto the informed and reason-

able decision of a mature minor to terminate her pregnancy. In deciding whether to permit a minor to have the abortion she wants, the judge's role is not limited to determining her capacity to give informed consent, but rather, extends to determining if, in his view, the desired abortion is in the minor's "best interests". This power to veto the informed decision of a mature minor and her physician to terminate her pregnancy is squarely at odds with the fundamental privacy right to decide. And the unconstitutionality of this third party veto is not cured by the "best interests" standard, a standard without meaning in the context of the abortion decision. (Pages 36-43.)

Third, the statute's requirement that, if one parent refuses consent, a minor must bring judicial proceedings to overturn that refusal is a substantial deterrent to deciding in favor of the abortion choice. Many minors would not undertake such judicial proceedings, especially as the proceedings can only harm the family relationship, whichever way the judge decides on the abortion question. Accordingly, parents who refuse to consent to their daughter's abortion choice have effectively been empowered by the statute to veto it. Moreover, forcing a minor to institute suit against her parents imposes upon her a number of practical and psychological burdens. These burdens will deter many minors from exercising their constitutional right to decide in favor of a legal abortion in Massachusetts, and will force many of them to seek out-of-state or illicit abortions, or to have an unwanted child. (Pages 43-52.)

Fourth, because the face of the statute not only fails to advise parents that they must limit their consideration of their minor daughter's abortion choice to her "best interests", but also suggests by its breadth that parents are free to consider other factors, the statute needlessly increases the likelihood of parental refusals to consent for

improper reasons, and thus increases the likelihood of a minor confronting her parents in court. Increasing the likelihood of such courtroom confrontations with respect to a minor's abortion decision unduly burdens the minor's constitutional right to decide. (Pages 52-55.)

None of these weighty burdens is justified by any of the supposed significant state interests proffered by appellants. The statute works against and sweeps far beyond the state interest in protecting against improvident decision-making, an interest already safeguarded by the Massachusetts common law and statutory mature minor rules, and an interest hardly furthered by a requirement of notice to both parents even when against the minor's best interests, or a provision for judicial override of a mature minor's informed consent. Nor may the statute be justified as "sanctioning" parental consultation, inasmuch as the statute goes far beyond merely requiring parental consultation, but also irrationally requires such consultation even when contrary to the best interests of the minor or the family. Finally, while the state's interest in remedying possible inadequate counselling by some clinics might support a narrowly drawn statute addressed to that end, the statute involved in this case has not even a rational relationship to this interest. (Pages 55-63.)

Equal Protection of the Laws

The statute also denies mature minors the equal protection of the laws because the burdens imposed upon the minor's fundamental constitutional rights are not justified by significant state interests and the statutory classifications are not narrowly drawn to express only the legitimate state interests at stake. (Pages 63-65.)

There is no reasonable basis for the statute's distinction between an adult and a mature minor who has given informed consent. Once a minor is found to be mature

and informed, the state's interest in protecting her from the special consequences of her minority — immaturity and lack of informed understanding — is extinguished. For the state to persist at that point in imposing on the minor the burdens of mandatory parental consultation and potential judicial veto, burdens which would not be imposed on an adult, is without rational basis and so impermissible. (Pages 65-66.)

The statute is also unduly burdensome as compared to the Massachusetts common law mature minor rule, under which a mature minor may consent to an abortion without notifying her parents if her physician determines that such notice is not in her best interests. The additional burdens imposed by the statute do not advance significant state interests which would not be adequately met by the announced common law rule. (Pages 66-68.)

Finally, under the statutory mature minor rule (§ 12F, *supra*), the state impermissibly discriminates between married and unmarried minors and between minors deemed mature by the statute who seek abortions and those who seek other medical care. Section 12F irrationally permits the classes of minors enumerated therein to consent to medical procedures more complicated and dangerous than abortion while requiring such minors to obtain parental or judicial consent in order to obtain an abortion. (Pages 69-71.)

None of the burdensome distinctions discussed above is supported by a "significant state interest", nor are the statutory classifications narrowly drawn to serve only the interests which the state advances in their support. The legitimate scope of the state's interest in assuring that the minor's decision whether to continue or terminate a pregnancy be wisely made is limited to assuring that the minor is mature and informed. The statutory classifications are overinclusive, in that they impose burdens unrelated to an interest in assuring that the minor is mature and informed; at the same time, they are underinclusive in that they do not impose parental notification requirements on the minor who is immature in fact but who wishes to continue her pregnancy to term. Finally, the state may not in the first two trimesters, seek to further its interest in encouraging normal childbirth "by directly restricting a woman's decision whether or not to terminate her pregnancy." *Colautti v. Franklin,* —— U.S. ——, No. 77-891, slip op. at 7 (Jan. 9, 1979). (Pages 71-74.)

Facial Invalidity of the Statute

The district court also properly invalidated the statute on its face. The district court found that the claims of all minors to whom the statute applies, including both mature and immature minors, were properly before the court and so rejected appellants' proposed "as applied analysis". As to both mature and immature minors, the statute is unconstitutional. (Pages 74-78.)

Moreover, there is no savings construction of the statute available, as the statute has been authoritatively construed by the state's highest court. It would have been improper for the district court to have altered the statute's terms, particularly when appellants' proposed savings constructions were specifically rejected by the state court as being inconsistent with the legislative intent. In addition, these proposed constructions would not meet the standard of definiteness required of criminal statutes and statutes which impinge on fundamental rights, nor would they be consistent with general principles of statutory construction. (Pages 78-85.)

Procedural Orders Below

Finally, appellants have not met their burden of demonstrating reversible error in the district court's procedural order concerning discretionary discovery and its order allocating costs. (Pages 85-90.)

Argument.

As construed by the state court, the statute, Mass. G.L. c. 112, § 12S, is plainly unconstitutional under the abortion-related cases decided by this Court. It is now clear, as it was not when this Court first had the statute before it, that in every case the statute requires the consent of both parents or, failing that, notice to them of a judicial hearing — regardless of whether the minor is capable of giving informed consent, and regardless of whether such notice would be contrary to her best interests.[20] *See Attorney General* at 303; *compare Bellotti I,* 428 U.S. at 144, 145. Similarly, it is now clear, as it was not when this Court first had the statute before it, that a minor who is determined by a court to be capable of giving informed consent will still not be allowed to do so, unless a judge determines that her decision is in her "best interests."[21] *See Attorney General* at 303; *compare Bellotti I* at 144, 145.

Despite the state court's draconian construction of the statute, the appellants continue to portray it to this Court, as they did before, as an innocuous and benign piece of legislation. Appellants defend the statute with the recurring plea that it is merely "neutral" (Brief for the Appellants, 29) and protectionist, and serves only the "salubrious" (*id.* at 42) purpose of helping a pregnant unmarried minor decide whether to continue or terminate her pregnancy:

> The statute is neutral on its face and does not discourage the selection of any of the various legitimate alternatives which comprise the abortion decision. It is also inherently neutral in application as a result of its reliance upon the best interest standard. *Id.* at 29.

The statute is thus portrayed as no more than an example of traditional state paternalism designed to protect minors neutrally.

In fact, however, the statute is not neutral on its face, nor would it be neutral in application. The state has classified minors in two groups — pregnant minors who wish to bear a child, and those who do not. Another statute within the same chapter — Mass. G.L. c. 112, § 12F — provides that a pregnant minor of whatever age or level of maturity is conclusively presumed to be capable of giving effective consent to any medical procedure whatsoever, *except* abortion or sterilization:

> Any minor may give consent to his medical or dental care at the time such care is sought if . . . (*iv*) she is pregnant or believes herself to be pregnant . . . .
>
> Consent shall not be granted under subparagraphs (*ii*) through (*vi*), inclusive, for abortion or sterilization.

Thus, a pregnant "immature" minor of ten years of age, to borrow appellants' example (Brief, 11), is authorized to consent to any medical care, including delivery of her child, without consulting her parents or obtaining a court's determination of "her best interests". Conversely, a

[20] The district court called this the "parents' bypass" issue. *Baird III* at 999. It concerns both "mature" and "immature minors".

[21] The district court called this the "judicial override" issue. *Baird III* at 999.

minor of 17 years of age, found by a court to be mature and to have made a reasonable and informed decision to terminate her pregnancy, may not do so without first informing both her parents, and, if *either* objects, obtaining a court decision that the abortion is in "her best interests". Thus, the statutory scheme of chapter 112 insulates one decision — to bear a child — from any parental or state involvement, while burdening the other decision — to have an abortion — with extraordinary parental and state involvement. To label such a statutory scheme "neutral" is to ignore its terms.

Once the fundamental dichotomy of the statutory scheme is bared, appellants' claim that the statute is designed "to serve this 'over-riding consideration' " "that the minor make the choice as wisely as possible" (Brief, 19) rings hollow. The statute surely does "structure the abortion decision making process," as appellants note (Brief, 17-18), but it does so by imposing a series of hurdles only upon the minor's decision (including the mature minor's decision) to terminate her pregnancy, and never upon her decision to continue it. And the related statute — § 12F — removes any doubt there may have been at common law concerning the necessity of consent to medical treatment of any sort for a pregnant minor to bear a child.

Appellants' justification of the statute as a neutral aid to decision making, thus bears no relationship to its actual terms or application. If mandatory parental consultation is an aid to a minor's decision whether to continue or terminate a pregnancy,[22] it is as valuable when the minor's choice is to continue as it is when her choice is

[22] Unquestionably there is an important potential benefit of parental consultation with an unmarried minor concerning her decision whether to continue or terminate her pregnancy. Such consultation is frequently both wise and desirable. But the statute here does not merely encourage parental consultation in most cases.

to terminate. Yet only the minor who wishes to terminate her pregnancy is *compelled* by the statute to involve her parents in the choice. The minor who is willing to continue her pregnancy is not only not compelled by the statute to consult her parents, but under § 12F is excused from consulting them with respect to medical treatment for pregnancy or for anything else (other than abortion or sterilization).

Similarly, if judicial superintendence is necessary to determine whether the minor's decision is truly in her "best interests", then it is as necessary when the minor's choice is to continue the pregnancy as it is when her choice is to terminate. The blunt fact is that the statute does not seek to ensure that the minor choose wisely but rather seeks to control the minor's choice by imposing burdensome restrictions exclusively on the abortion alternative.

The statute, though somewhat more sophisticated in design than some previously considered by this Court, is in substantial measure another anti-abortion statute. If enforced, it will cause some minors to bear unwanted children, and will lead others to seek dangerous illegal abortions. *See YWCA* v. *Kugler,* 342 F. Supp. 1048, 1074 (D. N.J. 1972), *aff'd*, 493 F. 2d 1402 (3d Cir.), *cert. denied*, 415 U.S. 989 (1974).

I. The District Court Correctly Concluded that the Massachusetts Statute Unduly Burdens a Minor's Constitutional Right to Decide Whether to Terminate Her Pregnancy.

The applicable test for a statute such as the one before this Court is whether " 'it unduly burdens the right to seek an abortion'." *Maher* v. *Roe,* 432 U.S. 464, 473 (1977), quoting *Bellotti I,* 428 U.S. at 147. Appellants' attempted restatement (Brief, 27) in terms of "deleterious distor-

tion in a pregnant minor's decision making process'' contributes nothing to the analysis.

Of course, the constitutional right involved is the ''right to seek an abortion.'' *Bellotti I, supra.* This right, a right to choose and decide, is plainly what the district court meant by its shorthand reference (*Baird III* at 1003) to ''a basic constitutional right to an abortion.''[23] It is a right that extends to minors as well as adults. *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52, 74-75 (1976).

Manifestly, the statute imposes some burden on the minor's right to decide. It cannot be said here, as it was said in *Maher,* that the state ''has imposed no restriction on access to abortions that was not already there.'' *Maher* at 474. The statute requires that in *all* cases *all* minors (not married or previously married) who choose to terminate their pregnancy must obtain the consent of *both* parents, or sue their parents and obtain the consent of a state court judge; in *all* cases *both* of the minor's parents must be notified of the judicial hearing and given an opportunity to be heard, *even where that is against the minor's best interests;* the judge can override a mature minor's informed choice; indeed, the judge can override the informed choice of a mature minor *and* the concurrent choice of one of her parents. These are very real burdens in fact, as the district court specifically found. *Baird III* at 1001-1002; *Baird I* at 853-855. Appellants do *not* challenge any of these findings, or any other findings, as ''clearly erroneous'', Fed. R. Civ. P. 52, and, therefore, appellants' suggestion (Brief, 20) that the statute imposes no burden at all is groundless.

[23] This shorthand expression was similarly used by the dissenting judge in the district court. *Baird III* at 1016 (''right to an abortion''). Similar language has been used by, for example, Mr. Justice Stevens, dissenting in *Carey* v. *Population Services Int'l,* 431 U.S. 678, 713 (1977) (''right to abort'').

Appellants apparently accept that a minor female, like an adult female, has a constitutional ''right to make the abortion decision.'' Brief for the Appellants, 26. Were the statute designed only to ensure the minor's capacity to make that decision, then, absent other unrelated objections, the statute might not be burdensome in a constitutional sense. Capacity to choose is inherently a legitimate prerequisite of the constitutional right of privacy to make the intimately personal decision whether to continue or terminate a pregnancy.[24] But the statutory procedure for mandatory parental notice and opportunity to litigate is unrelated to the question of capacity and, contrary to appellants' suggestion (Brief, 32-33), is not ''an appropriate means . . . for promoting sound decision making.'' The statutory procedure is, in fact, an oblique denial of the fundamental constitutional right to decide consistently recognized by this Court.

A. *The Statute Is Unduly Burdensome in that It Requires Parental Consent or Notice to Both Parents and an Adversary Judicial Hearing in Every Case.*

1. *The requirement of giving notice in every case is unduly burdensome.*

In *Bellotti I* (at 143), appellants argued to this court that the statute ''was capable of a construction that would withstand constitutional analysis'' in that, among other things, the statute did *not* require parental consultation in all cases but permitted it to be bypassed in the case

[24] Conversely, if a woman, regardless of whether she is above or below majority age, has that capacity to choose, the state may not override her constitutional right to do so by delegating the decision to another. Hence, as the state court noted, the case for a mature minor rule has ''particular force'' with respect ''to a medical procedure to which a minor may be entitled by constitutional right.'' *Attorney General,* 360 N.E. 2d at 296.

of a mature minor and also in the case of an immature minor if an abortion was shown to be in her best interests.

> The picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but that [1] permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, [2] permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from a statute that creates a "parental veto". *Bellotti I* at 145.[25]

The state court, however, flatly rejected the innocuous picture of the statute which appellants attempted to paint.

> Parental consultation is required in every instance where an unmarried minor seeks a non-emergency abortion. . . . The parents, if available, must be notified of the court proceeding, and must be allowed to participate in it. *Attorney General* at 303.

Thus, the statute does not merely prefer parental consultation in most cases; it requires that in all cases both parents must be informed and (if they do not consent) invited to oppose in court the minor's decision to terminate her pregnancy.[26]

[25] Mr. Justice Stewart, concurring in *Danforth* and citing *Bellotti I*, also noted that a "materially different constitutional issue" would be framed were the statute construed to require parental consultation and consent "in most cases" while recognizing that in come cases "the minor is mature enough to give an informed consent without parental concurrence . . . ." *Danforth* at 91.

[26] Requiring the minor to name her parents as defendants in the superior court also, as the district court found, tends to destroy the family relationship and places a heavy burden on the minor. Whatever the outcome of the court hearing, the minor "is in a no-win situation." *Baird III* at 1001-1002.

The requirement of notice and an opportunity to litigate applies without regard to whether the minor is "mature" — that is, capable of giving "effective consent for termination of her pregnancy" (*Danforth* at 75; majority opinion) or "informed consent" (*id.* at 91; concurring opinion). Where a woman, albeit chronologically a minor, can give "informed consent,"[27] requiring her nevertheless to notify both of her parents and obtain their consent or else litigate with them to uphold her choice, is surely a great burden in any case, and often will be a psychologically devastating burden.

Parental notice and opportunity to litigate are required by the statute even if the minor's best interests would be served by her parents not being informed or consulted.[28] A judge who so finds is still not permitted to bypass the notice requirement — even for a "mature" minor. Despite the claims of appellants and intervenor-appellant, there can be no wisdom in a requirement that both parents be notified, even when, by hypothesis, the notice itself is factually and objectively against the minor's best interests. The statute requires notice even when, for example, a judge has concluded that a parent, if notified, is likely to harm or even kill the minor or the boy involved with her

[27] The state court recently declined to adopt any definition of the term "informed consent". *Schroeder* v. *Lawrence*, Mass. Adv. Sh. (1977) 286, 289-90, 359 N.E. 2d 1301, 1303. In *Danforth*, this Court was satisfied with a definition of informed consent in terms of "the giving of information to the patient as to just what would be done and as to its consequences." *Danforth* at 67 n.8.

[28] In both *Danforth* and *Bellotti I*, this Court implicitly recognized that in some instances it is in the minor's best interests, be she mature or not, that her parents not be consulted about the abortion decision.

pregnancy or both. This kind of requirement can only be described as "irrational and perverse." *Carey* at 715 (Stevens, J., concurring).

That mandatory parental consultation would work harm in a significant number of cases is clear from the district court's findings. As the district court found, there are a broad range of reasons why parental consultation would not be consistent with a minor's best interests.

> Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. . . . [A]n appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or on continuance of the pregnancy as punishment. *Baird III* at 1001.

Similar findings were made by the district court after the original trial. *Baird I* at 853-854.

Thus, the statute's absolute requirement that parents be notified of their daughter's choice of abortion and of their right to oppose it in court conflicts with the specific findings which were made in this case. Yet the statute precludes independent judicial assessment of whether such notice is in the minor's best interests. "To this extent the state is ruling what is to a minor's best interests, instead of consigning the question to an unfettered tribunal. Thus it has diminished the only feature of the statute that could save it from the Court's ruling in *Danforth.*" *Baird II* at 856.

2. *The requirement of giving notice to both parents is unduly burdensome.*

The undue burden of the requirement of giving notice to (or obtaining the consent of) both parents, rather than

one, is clear and was implicitly recognized by the district court, even though it was not cited expressly as a matter separate from the burdensomeness of the requirement of notice in all cases. Each of the examples the district court gave (*Baird III* at 1001) of reasons for bypassing parental notice could involve one parent or both. Obviously, requiring notice to both parents increases the likelihood that a minor will encounter one unsupportive parent with respect to whom notice would be contrary to the minor's best interests. There was ample evidence of cases where it was only one of the two parents who should not be notified.[29] Plaintiff Mary Moe [I] herself asserted, as a reason for not wanting to tell her parents of her pregnancy, a certainty that one parent, not both, "would take some physical action against the boy." *Baird I* at 850.

In each post-trial decision, the district court expressly commented that the additional burden of notice to both parents instead of one was unsupported by any reason or justification. "We find nothing about abortions that requires the minor's interest to be treated differently from other medical and surgical procedures, as to which we find the custom to be to proceed under the consent of one parent." *Baird I* at 852. "The statute does not purport simply to codify what we find to be accepted medical practice in Massachusetts hitherto, namely that certain medical procedures involving minors require the consent of a parent. This statute creates a special, unique exception by requiring the consent of both parents." *Id.* at 855. "Nor, parenthetically, has any reason been advanced for attaching to abortion the special requirement of dual con-

[29] Plaintiffs' expert Dr. Nadelson testified that she often encountered cases where the minor and one parent jointly agreed that an abortion was the correct decision and insisted that the other parent not be told. 2 App. 147-148. *See also* 2 App. 19, 38. The statute apparently requires both parents' consent even where the parents are separated or divorced.

sent by both parents." *Baird III* at 1004 n.9. Where accepted medical practice is to obtain the consent of one parent when consent is deemed necessary (e.g., for an immature minor), the requirement of getting both parents' consent or giving them both notice of a judicial hearing is unduly burdensome, without regard to whether the minor is "mature" or "immature".[30]

B. *The Statute Is Unduly Burdensome in that Its "Judicial Override" Provision Creates an Unconstitutional Third Party Veto of a Mature Minor's Decision.*

1. *The statute's "judicial override" provision is a third party veto.*

This Court's remand in *Bellotti I* was predicated in part on appellants' suggestion "that the last paragraph of [the statute] preserves the 'mature minor' rule in Massachusetts, under which a child determined by a court to be capable of giving informed consent will be allowed to do so." *Id.* at 144. Appellants argued that once an informed consent by a mature minor was found, the court's function would be complete, and thus led this Court to hypothesize a construction of the statute that "permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion". *Bellotti I* at 145.[31] However, the state court has rejected that construction of the statute:

> Unless a contrary conclusion is compelled constitutionally, *we do not view the judge's role as limited to a determination that a minor is capable of making, and has made, an informed and reasonable decision to have an abortion.* . . . [I]n circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail assuming that his conclusion is supported by the evidence and adequate findings of fact. *Attorney General,* 360 N.E. 2d at 293 (emphasis added).

The district court referred to this power to overrule a mature minor's decision to terminate her pregnancy as a "judicial override", and condemned it. *Baird III* at 999, 1003.

The provision for judicial override of a mature minor's informed decision imposes another unduly burdensome restriction on the constitutional right to decide. If the privacy right is to survive, the decision — "a woman's decision whether or not to terminate her pregnancy"[32] — must be protected "from unwarranted governmental in-

[30] For the mature minor, the both-parent requirement is a cumulative burden: it involves both parents, whereas neither should be involved. For the immature minor, however, the both-parent notice requirement has particular significance because it is not only burdensome in itself, but it is what exposes the immature minor to the risk of being forced to give notice against her best interests. By definition, the immature minor cannot give effective consent herself, but must have someone give such consent for her. According to Massachusetts medical practice and custom, as found by the district court, this consent, in the absence of the statute, would usually be given by one parent. The both-parent notice requirement prevents the immature minor from proceeding according to this custom, and also exposes her to the separate burden of having to give notice to a second parent even when one parent has consented and the notice would be against the minor's best interests.

[31] Similarly, Mr. Justice Stewart, concurring in *Danforth* and citing *Bellotti I*, noted that one feature of the statute which would make it materially different from a parental veto would be provision for a "judicial determination that the minor is mature enough to give an informed consent without parental concurrence *or* that abortion in any event is in the minor's best interest." *Danforth* at 91 (emphasis added).

[32] *Roe* v. *Wade,* 410 U.S. at 153.

trusion."[33] Accordingly, in *Danforth*, this Court struck down requirements of spousal and parental consent, holding that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." *Id.* at 74.

This privacy right does not "come into being magically only when one obtains the state-defined age of majority. Minors . . . possess constitutional rights." *Danforth* at 74. But because the right to decide assumes the capacity to understand the decision and the alternatives involved, a state intrusion solely to insure "awareness of the decision and its significance" is not unwarranted. *Danforth* at 67 (upholding a requirement of consent by the woman herself). Not every minor can be made sufficiently aware of the decision and its significance to make the decision herself.[34] But for those who can, the fundamental right of privacy to decide bars the state from delegating it to another.

The statute, as construed by the state court, is not only burdensome,[35] but provides for a forbidden veto in that it expressly authorizes the judge to override the informed

[33] *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972).

[34] "We . . . [do] not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. *See Bellotti* v. *Baird*, post, p. 132." *Danforth* at 75. In Note, *The Mental Hospitalization of Children and the Limits of Parental Authority*, 88 Yale L.J. 186, 201-202, 206-209 (1978), it is suggested that a child becomes capable of intelligent, autonomous choice, constitutionally protectable, at about the time of adolescence or age 14. Psychological evidence is reviewed at 207 n.109.

[35] The district court found that "it is a highly traumatic experience for a mature minor to be refused a desired abortion." *Baird III* at 1003.

decision of a mature minor to terminate her pregnancy.[36] The district court unanimously agreed that the judicial override provision was unconstitutional. The majority, correctly applying the necessary logic of a privacy right to decide, observed that the state's power to limit this right "should extend only to protect the minor from the special consequences of her minority — immaturity, and the lack of informed understanding." *Baird III* at 1003. Instead, the statute disregards the minor's maturity and her informed understanding and permits a third party to veto her decision. Even the dissenting judge in the district court found the judicial override provision "to be self-contradictory and incapable of rational application", and observed that the decision is left "to the arbitrary will of the judge." *Baird III* at 1015.

Appellants respond by pointing to the language in *Danforth* which prohibits the state from giving "a third party an absolute, and possibly arbitrary, veto over the decision . . . to terminate", *Danforth* at 74, and by focusing on the word "arbitrary". Appellants say (Brief for the Appellants, 28) that a judicial determination simply cannot be arbitrary — presumably meaning, in light of *Danforth*, that it cannot "possibly" be arbitrary. There are at least three fallacies in this unusual argument. First, appellants ignore the analytical basis for *Danforth's* prohibition of a third party veto. That basis is not the possibility of arbitrariness; *Danforth* sanctions "rational" vetoes no more than arbitrary ones. Rather the basis is the funda-

[36] As construed, the statute permits the judge to overrule a minor's decision which is both "informed and reasonable". *Attorney General* at 293. If a judge can find a minor's decision to terminate her pregnancy not only to be informed but also to be as reasonable as the decision to continue, yet override the minor's decision and compel her to accept continuation, the judicial override provision is even more indefensible.

mental incompatibility of a third party veto with the concept of privacy — that the decision to continue or terminate is too private and personal for anyone but the woman to make. Second, it denies reality to argue that there is no possibility of any state court judge making an arbitrary decision or that, given the discretionary nature of the decision, an arbitrary trial court decision could never withstand appellate review.[37] Third, the possibility of unprincipled, if not wholly arbitrary, decisions has been increased beyond the inherent fallibility of any judicial system by the way the judicial override power in the statute was defined, or more accurately, undefined by the state court. According to that court, the judge may override a "reasonable" decision by an informed minor, and in so doing, may consider "all relevant views presented to him." *Attorney General* at 293. Accordingly, the judge is free to conclude that, although the minor's choice of termination is reasonable, the choice of continuation is preferable and the minor should be compelled, therefore, to continue her pregnancy and have a child. In so doing, the judge is free under the statute as construed to consider such views as, for example, that it is in the minor's "best interests" that she not violate the moral or religious principles of her parents or the religion in which they have raised her.[38]

Any decision which overrides a mature minor's informed and reasonable decision is indeed "arbitrary", not always in the sense of capricious, but surely in the sense of with-

[37] Indeed, there is an air of fantasy in supposing that an unmarried pregnant minor who desires an abortion will initiate a trial court proceeding, much less undertake an appeal, if she can possibly find her way out of state or to an illicit (and perhaps unqualified) abortionist instead. *See* 2 App. 31-32.

[38] *See* Brief, Amici Curiae of Americans United for Life, et al. at 8 (arguing for parents' right to persuade child "according to their family moral and theological principles").

drawing from her the right to decide between alternatives. It is also arbitrary in the sense described by the dissenting judge in the district court: "[t]he lack of any ascertainable principle to guide a judge in differentiating between concepts of what is a reasonable and informed course . . . leaves the resolution of the problem to the arbitrary will of the judge." *Baird III* at 1015. The mere existence of a third party's power to veto one decision and choose the other — even if the veto is not exercised — squarely conflicts with the concept of a privacy right to decide for oneself.

2. *The "best interests" standard does not save the third party veto created by the "judicial override" provision.*

The "best interests" standard which the state court read into the judicial override provision does nothing to cure the statute's constitutional defect of creating a third party veto. Although the "best interests" standard is well understood in other contexts (for example, in custody dispute cases), in the peculiar circumstances of the pregnancy continuation/termination decision, the "best interests" standard is meaningless.[39]

There was no evidence or suggestion, and the state court made no suggestion, of any recognized criteria or objective indicia which could guide a court's determination of whether to veto a mature minor's informed decision to terminate her pregnancy. Thus, there is too great a risk

[39] The state court's permissive phrasing in discussing the "best interests" standard makes it even more meaningless: "the judge *may* [— not shall —] give consent to an abortion where it is shown that, in spite of the disapproval of one or both parents, the best interest of the minor will be served". *Attorney General* at 293 (emphasis added). The language of the state court decision thus appears to confer discretion not only to ignore her informed and reasonable choice but also her "best interests".

of an unprincipled, or merely mistaken, override of the minor's decision. It is difficult, if not impossible, to imagine a case where objective criteria would support a conclusion that it would be in the minor's "best interests" for a judge to override her mature and informed decision to choose an abortion,[40] and the state court offered no example of circumstances where a minor's "best interests" would justify a judge's overriding her decision. For the same reasons, appellate review would almost certainly be limited to an "abuse of discretion" test and could not be meaningful.

Moreover, available objective criteria suggest that, from the standpoint of physical and mental health, *compelling* a minor to bear a child is never in her "best interests". *See Baird III* at 1004 (findings as to psychological and physical risks). As to physical risks, the critical fact is that a first trimester abortion is usually safer, and especially so for a minor, than continuing a pregnancy.[41] The facts concerning psychological risks are equally graphic. The

[40] There was no evidence in this case, and neither appellants nor intervenor-appellant have ever suggested that any exists, which indicates that it ever could be in the best interests of a mature and informed minor to carry a pregnancy to term *against her wishes.*

[41] For any woman, risk to life from a legal, first trimester abortion is significantly less than the risk of bearing a child. *Roe* v. *Wade*, 410 U.S. at 149-150. The contrast is more stark in the case of a minor, for the risk to life of bearing to term increases dramatically as the age of the mother decreases. 2 App. 29. The death rate from the complications of pregnancy, birth and delivery is *sixty percent higher* for women who become pregnant before they are 15 than women in their early twenties, and the risk of death for 15 to 19-year-olds is 13 percent higher than for women in their early twenties. Toxemia has been cited as a "special hazard" of pregnancy among the very young because of stress of such early pregnancies, poor diet and inadequate physical development. App. Exhibit 2 at 23. *See also* Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 Va. L. Rev. 305, 307 n.11, 308 (1974); Menchen, *The Health and Social Consequences of Teenage Childbearing*, 4 Fam. Planning Perspectives 45 (1974).

younger the mother, the greater the emotional trauma of bearing and raising an unwanted child. "[A]n unwanted pregnancy is sometimes a social and emotional tragedy to an adult and . . . when the mother herself is a child it is even worse." 2 App. 7. This is especially so where she is unmarried, has not completed her education, and has little likelihood of being able to provide for herself or any children she may have.[42] There is a higher percentage of psychological problems among unmarried minors who elect to continue an unwanted pregnancy than among those who elect to terminate it. 2 App. 102-103, 114.

Finally, as this Court has recognized, the abortion decision is medical in nature. *Roe* v. *Wade,* 410 U.S. at 166. Participation by a physician is necessary. When the minor has the capacity to understand and consent to the abortion decision, and when the determination of this capacity and understanding has been made by a physician who can assess whether the minor understands its medical aspects, the provision for a further decision by a judge applying a "best interests" standard is simply an invitation for an impermissible third party veto.

C. *The Statute Is Unduly Burdensome in that the Judicial Proceedings It Requires Would Deter the Minor's Exercise of Her Constitutional Right to Decide.*

Were there no judicial remedy, there would be no question that the statute's requirement of obtaining both par-

[42] Early motherhood in America's present economic structure is one of the most certain methods to ensure a lifetime of dependency on welfare payments for the mother and her children. *See* 1 App. Exhibit 2, 26-27 (correlating teenage motherhood with poverty and welfare). *See also* Note, *Minors and Contraceptives: The Physician's Right to Assist Unmarried Minors in California,* 23 Hastings L. J. 1486, 1489 (1972), citing Hearings on S. 2108 and S. 3219 before the Subcom. of the Comm. on Labor and Public Welfare, 91st Cong., 1st and 2nd Sess. 69 (1970); and App. Exhibit 2, at 18.

ents' consent would be an impermissible parental veto. *Danforth,* 428 U.S. at 74. The parental consent requirement here was described by the state court as "by analogy to the legislative process, a veto which may be overridden." *Attorney General,* 360 N.E. 2d at 294. However, because the judicial proceedings prescribed are so burdensome to minors and would deter many of them from litigating against their parents to defend their preference, there is no real judicial remedy and parents have effectively been given an absolute veto, albeit *de facto* and not *de jure.*

In this case, the statute's requirement that, if one of a pregnant minor's parents refuses to consent to her abortion decision, the minor must go to court to litigate their refusal is in fact deterrent to abortion choice. The district court found that "the burden of seeking a court order — is a heavy one", *Baird III* at 1001, even assuming, as the district court did, good faith effort by state court personnel and court judges.[43] The district court reasoned as follows:

> Plaintiffs' expert credibly and without contradiction testified that court proceedings over such a personal matter, even if conducted in the most benign manner, would be "severely detrimental to a teenager, particularly since she had just met with her parents' disapproval, which is difficult enough." Further, she credibly testified that many minors would not go to court, especially if it had to be against her parents, but rather would resort to illegal and frequently dangerous abortions. But assuming again in the statute's favor that the minor would initiate the proceedings, defendants' own expert expressed the opinion that if she did go to court and was successful, it would be likely to destroy what was left of the family relationship. The minor accordingly, is in a no-win situation. *Baird III* at 1001-1002.

[43] *See* 1 App. 153.

The Court of Appeals for the Seventh Circuit, reviewing a similar statute requiring judicial proceedings in default of parental consent concluded that it "places an undue burden upon [minors]. [Judicial] proceedings, with parents present as opposing parties, would certainly destroy what was left of the family relationship." *Wynn* v. *Carey,* 582 F. 2d 1375, 1388-1389 (7th Cir. 1978).

Neither the district court nor the court in *Wynn* v. *Carey, supra,* reached this issue, but it is important to note that the particular court proceedings contemplated by the statute not only fail to cure the unconstitutional parental veto but themselves add an undue burden. It is submitted that, to borrow the words of the district court, "the entire concept of a court proceeding to remedy the unconstitutionality of the parental veto, as struck down in *Danforth,* is but an ignis fatuus, and itself imposes too great a burden upon the exercise of the minor's rights." *Baird III,* at 1002. *See Zablocki v. Redhail,* 434 U.S. 374, 387 (1978) (court proceedings burdened exercise of right to marry).

1. *Psychological deterrents.*

If, as the statute contemplates, a minor must sue her parents and they must be notified and invited to come to court to oppose her choice, the deterrent effect on her attempting to exercise her legal right to decide in favor of abortion is substantial. Inasmuch as "many minors would not go to court . . . but rather would resort to illegal and frequently dangerous abortions" (*Baird III* at 1001-1002),[44] the statute surely works an "unduly burden-

[44] "If [minors] are unable to get parental consent . . . they will seek help elsewhere and they will go to some of the unqualified centers or criminal abortionists . . . . [T]he law is being

some interference with her freedom to decide whether to terminate her pregnancy." *Maher* v. *Roe*, 432 U.S. at 474.

Moreover, even for the minor prepared to accept parental notification and possible parental confrontation as the price of her decision, the process of going to court to seek judicial approval of that decision will surely be a traumatic experience. For most lay persons, especially the young, the solemnity and formality of a court and its proceedings, deliberately reinforced by building design and courtroom rituals, are awesome and intimidating. For many minors, such a proceeding will be their first exposure to a court in their lives. They will be seeking permission from a public official to make a decision which is so profoundly private as to require constitutional protection. And their choice may still be rejected by a judge. A pregnant minor, already at odds with her parents and confronted with a risk that her decision may still be overturned by yet another person—a stranger at that—may well abandon any attempt to obtain a legal abortion in Massachusetts. At the very least, having to initiate such a court proceeding cannot enhance the quality of her "sound decision making" (Brief for the Appellants, 33).

Finally, the prospect of litigating against her parents obviously will deter a minor's free choice. Any fear the unmarried minor may have of a violent or punitive reaction by her parents to the fact of her pregnancy or to her choice of abortion, or both, will inevitably be heightened by the requirement of instigating a lawsuit against them. Whatever the grounds for her parents' refusal to consent, the minor must go to court to overturn it. In court, one parent who consents may well be aligned with the minor against the other parent. Such a result can be

broken all over the country where there is such a law." 2 App. 31-32.

devastating to the entire family relationship.[45] A minor who perceives this risk of a traumatic family break, as most surely would, may well conclude that a court proceeding would be simply too damaging to the family.

2. *Procedural difficulties.*

On the record in this case, there is no basis for an assumption that judicial proceedings under the statute will be "nonburdensome". *Bellotti I* at 145. The state court has so far declined to prescribe any rules for such proceedings, saying that this is province of the state trial court (the "superior court") which will hold those proceedings. *Attorney General* at 297-298. Only an expectation is offered: "we anticipate that the Superior Court, aided by the clerks of court and the Attorney General, will take the necessary steps to implement the necessary procedures." *Id.* at 298. The absence of specific rules or safeguards built into the statute itself was held by the Court of Appeals for the Seventh Circuit to be one constitutional infirmity of a similar statute. *Wynn* v. *Carey*, 582 F. 2d at 1389.

At present, therefore, a proceeding under the statute is simply an action "of a civil nature" in the Massachusetts superior court, and governed by the Massachusetts Rules of Civil Procedure.[46] It must be commenced with a complaint, and process must be duly served by one of the prescribed methods. Mass. R. Civ. P. 2-4. Presumably, the minor has the burden of going forward to present "evidence" as to her best interests and the burden of persuasion as well.

[45] 2 App. 147-148, 422, 426, 428.

[46] These rules are substantially parallel to the Federal Rules of Civil Procedure. *Rollins Environmental Services, Inc.* v. *Superior Court*, 368 Mass. 174, 179-180, 330 N.E. 2d 814, 818 (1975).

A related cause for concern is the minor's need for legal assistance. The state court recognized this need and held that an indigent minor is entitled to have counsel appointed for her. *Attorney General* at 301. However, the appointment must be by a judge, so the minor must somehow get before that judge (*in camera,* if her anonymity is to be protected) to have counsel appointed. Because Legal Services Corporation attorneys are not available,[47] a minor will be "required to navigate at least the initial stages of a judicial procedure either on her own or with private counsel. Yet, it is obvious that private counsel will be beyond the resources of most teenagers." *Wynn* v. *Carey,* 582 F. 2d at 1389 n.28. The state court offered no guidance or judicial rule as to how a minor could obtain counsel in order to go to court in the first place.

3. *Delay and anonymity.*

Speed is, of course, critical in the abortion context. This Court, in the first appeal, noted appellants' claim that judicial proceedings "would be . . . speedy". *Bellotti I* at 144-145. Delaying the abortion decision or its effectuation can cause psychological and medical problems, especially as the minor approaches the end of the first trimester. *Baird I* at 853.

The state court also recognized the importance of speed in the abortion context and expressed an expectation of "prompt resolution" of any judicial proceeding. *Attor-*

[47] *See* 42 U.S.C. § 2996f(b)(8) (prohibiting the use of Legal Services Corporation funds where an individual seeks to procure a non-therapeutic abortion) and 45 C.F.R. § 1614.5(b) (barring the provision of legal services, at least without a court order, to a juvenile in proceedings against the parents to secure benefits or service). The Massachusetts statute requires that parents be named as defendants or respondents and notified in such a proceeding except where they cannot be located.

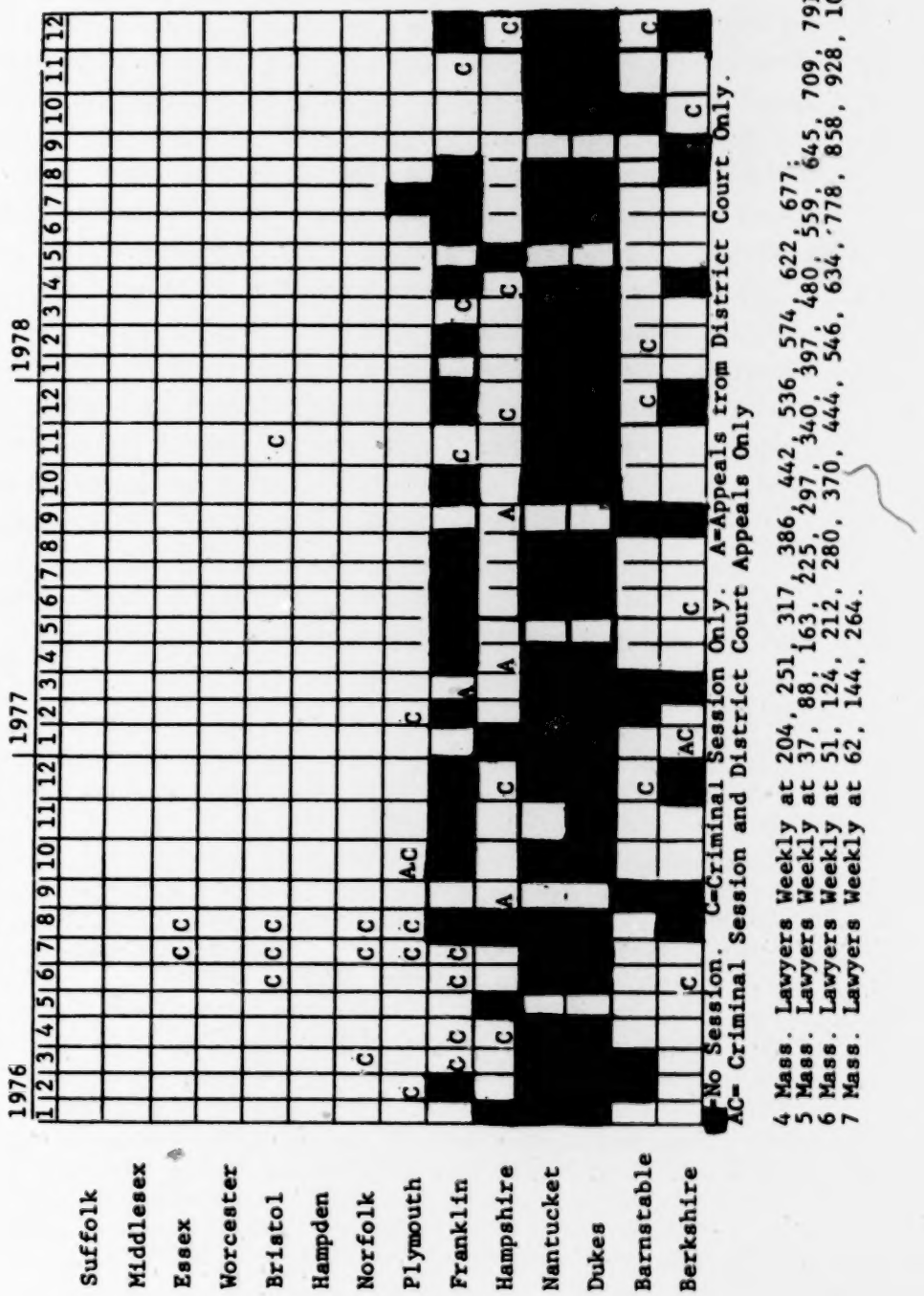
ney General at 298. However, the structure and organization of the Massachusetts court system, and the multiple procedures suggested by the state court, necessarily limit the availability and speed of any such judicial proceeding. First, notwithstanding the state court's observation that "hardly any person in the Commonwealth is more than one or two hours' travel from a court house where a Superior Court judge is available to process an application under" the statute, *id.,* the superior court sits only in the shire towns of the state's fourteen counties, Mass. G.L. c. 212, § 14, and many of those counties do not have continuous court sessions throughout the year.[48] When the local county court is not in session, a pregnant teenager will be forced to travel to Boston (Suffolk County) for a hearing.[49] A trip to Boston is a matter of considerable distance and expense for a minor living in, for example, Provincetown, at the tip of Cape Cod; Provincetown is in Barnstable County, which has had no court sessions for two-thirds of the year during the last three years.[50] Second, the state court's decision

[48] See chart on following page. When there are no court sessions, there is no judge in the courthouse. The state superior court judges "ride circuit" and are not assigned to any county. Mass. G.L. c. 211B, §§ 2, 9; c. 212, § 14A.

[49] Massachusetts Superior Court Rule 44 provides that where there are no civil sessions in a county superior court, cases from the county may be heard, after some rather technical preliminary maneuvering, in Suffolk County. (In the three western-most countries, the hearing can be in Springfield instead.) In such a situation, the minor presumably would have to perform all the preliminary steps on her own before getting to see a judge in Suffolk County to get court-appointed counsel.

[50] In discussing the availability of abortion facilities, the state court stated that no one can seriously maintain that a "fundamental right [may] be denied in Worcester County because it remains available in Suffolk or Barnstable." *Framingham Clinic, Inc.* v. *Southborough,* Mass. Adv. Sh. (1977) 1857, 1867, 367 N.E. 2d 606, 611.

COUNTIES/MONTHS IN WHICH THERE WERE CIVIL SESSIONS IN THE SUPERIOR COURT
January, 1976 - December, 1978



-No Session. C-Criminal Session Only. A-Appeals from District Court Only.
AC- Criminal Session and District Court Appeals Only

4 Mass. Lawyers Weekly at 204, 251, 317, 386, 442, 536, 574, 622, 677;
5 Mass. Lawyers Weekly at 37, 88, 163, 225, 297, 340, 397, 480, 559, 645, 709, 791;
6 Mass. Lawyers Weekly at 51, 124, 212, 280, 370, 444, 546, 634, 778, 858, 928, 1020;
7 Mass. Lawyers Weekly at 62, 144, 264.

suggests that at least *two* court hearings will normally be required for a minor to obtain a judicial determination of her case on the merits. The first will be a preliminary hearing before a judge to determine, in his discretion, whether to appoint counsel or a guardian *ad litem* for the minor. Then, "perhaps at a somewhat later date" (*Attorney General* at 298), the minor will be required to participate in an adversary proceeding against her parents to determine whether the judge will authorize the abortion. A judicial proceeding that requires multiple court appearances, and which may, in addition, require a minor to make multiple trips over long distances, plainly fails to qualify as "speedy and nonburdensome". *Bellotti I* at 145.

In the first appeal, this Court also considered it relevant whether the proposed judicial procedure "would ensure anonymity." *Bellotti I* at 145. A pregnant minor seeking judicial consent to an abortion must sacrifice her anonymity at least to the extent of approaching court personnel for initial help. This may well cause her to doubt whether her situation will remain anonymous. For example, a pregnant minor residing in Nantucket, Massachusetts (population 3774 [51]), who would have to file her complaint before the superior court in the Nantucket County courthouse located in Nantucket,[52] might well be deterred by the prospect of disclosure of her condition — not to mention the fear of possible "leaks" to others.

In sum, it is evident that procedures under the Massachusetts statute are likely to deter a pregnant minor's

[51] U.S. Bureau of the Census, Census of Population: 1970, Vol. 1, Characteristics of the Population, Part 1, U.S. Summary-Section 1, Table 31.

[52] See Mass. G.L. c. 223, § 1 with respect to requiring venue in the county of the minor's home.

exercise of her constitutional right to decide. As the Supreme Court of Washington has stated:

> Even if juvenile court intervention were established and automatic, the delays and costs inherent in litigation themselves would comprise an unworkable burden. Minor women unwilling to add litigation against their parents to their already acute personal difficulties would gain little from the possibility of court intervention. And even those who were sufficiently determined to go to court would find the costs of publicity, delay, and anxiety substantial. *State* v. *Koome*, 84 Wash. 2d 901, 906, 530 P. 2d 260, 264 (1975).

Accordingly, the requirement that a pregnant minor institute court proceedings against her parents in order to obtain an abortion will surely deter many such minors from exercising their constitutional right to choose. The proceedings prescribed by the statute here, even assuming adoption by the state court of rules to mitigate the burdensomeness of litigation, but surely in the absence of such rules, will have such a deterrent effect and should be recognized as a significant burden on a minor's exercise of her constitutional rights. *Cf. Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 640 (1974) (restrictive maternity regulations could operate "to penalize the pregnant teacher for deciding to bear a child").

D. *The Statute Is Unduly Burdensome in that Its Lack of Guidance to Parents Needlessly Increases the Likelihood of Courtroom Confrontations between Minor and Parents.*

Another distinct burden is imposed by the statute in that its lack of guidance to parents as to the basis on which they may withhold their consent needlessly in-

creases the likelihood of a minor having to confront her parents in court. Although the district court has never held that the burden of going to court is *per se* unconstitutional, it has repeatedly found that the burden is heavy and substantial. *Baird III* at 1001; *Baird I* at 856. Thus, the district court correctly observed that "anything that needlessly and incorrectly increases the likelihood of [having to go to court in opposition to her parents], imposes a burden that is constitutionally impermissible." *Baird II* at 856. The district court's discussion of what it called "formal overbreadth" (*Baird III* at 1004-1005) must be read in the context of its underlying conclusion that needlessly increasing the likelihood of courtroom confrontations between minor and parent is unconstitutionally burdensome.[53]

The state court held that parents must limit their concern exclusively to what will serve the minor's best interests. *Attorney General* at 292.[54] However, there is "no

[53] The district court said in this discussion "we regard it essential that the limited scope of the issue confronting parents, when considering whether to consent, be brought home as forcefully *and precisely* as possible, to minimize the incidence of improper refusals." *Baird III* at 1004 (emphasis added). Accordingly, the district court described the text of the statute as having a "chilling effect" — not, obviously, in the sense of first amendment doctrine as appellants seem to suggest (Brief, 54), but in the sense of chilling minors' rights by increasing the "incidence" and the likelihood of improper refusals, and thus increasing the likelihood of courtroom confrontations between parent and minor. *See M.S.* v. *Wermers*, 557 F. 2d 170, 176 (8th Cir. 1977) (in suit by female minor challenging county clinic parental consent requirement for minor's access to prescription contraceptives, mandatory parental notice "has had an obvious chilling effect upon [minor's] efforts to vindicate her constitutional rights").

[54] Of course, as the statute requires the consent of both parents, it is important to remember that a minor's parents may very well disagree between themselves as to whether an abortion is in

penalty if a parent does not apply the proper standard in deciding whether to consent," *id.* at 293; and as a practical matter, there is no way to prevent parents, or one parent, from withholding consent to a minor's decision in favor of abortion for any reason, including an impermissible reason. The text of the statute suggests no limitation of the parents' considerations to the minor's best interests, in deciding whether to grant or withhold their consent. "It would be only natural to read the statute the other way; in fact the defendants, the intervenor, and our dissenting brother, [citation omitted] all did so when the statute was before us initially." *Baird II* at 855. "This is not an unimportant matter. . . . Clearly, the freer the parent may feel to refuse consent, the more likely it will be that the minor will have to go to court." *Baird II* at 856.

Further, even when parents conscientiously seek to act in what they perceive to be their daughter's "best interests", it is likely that in the abortion context some parents will refuse consent for what are constitutionally impermissible reasons. For example, some parents will conscientiously believe that it is never in the best interests of their daughter to have a non-emergency abortion. There are parents who "would under no circumstances consent to the abortion". *Baird I* at 853. *See also* appellants' admissions at 1 App. 403-404. Obviously, parental judgments are, and always have been, influenced by the parents' moral and religious views,[55] and this is both benign and proper as to most issues. However, imposition of religious mores to override a minor's constitutional rights is impermissible. *State* v. *Koome,* 84 Wash. 2d 901, 908, 530

their daughter's best interest. "[T]his can be a bone of contention between the wife and husband." 2 App. 22.

[55] The evidence suggests that the most common reason for withholding consent "is of a religious nature". 2 App. 38.

P. 2d 260, 265 (1975); *Wisconsin* v. *Yoder,* 406 U.S. 205, 233-234 (1972). In the context of the minor's right to make the abortion decision, the state is forbidden to enforce a parental veto over a minor's informed decision to have an abortion "regardless of the reason for withholding the consent." *Danforth* at 74.

Not only does the text of the statute fail to require that parents limit their consideration exclusively to the minor's best interests, but it is so broad that it suggests that parents need not limit their consideration to those best interests. This increases the likelihood of parents refusing consent to a minor for reasons other than her best interests, and, consequently, increases the likelihood of courtroom confrontations between parents and minor. Increasing this likelihood of courtroom confrontation is, as has been demonstrated, an undue burden.

II. The Burdens Imposed by the Statute Are Not Justified by Any Significant State Interest.

Restrictions on a minor's constitutional right to decide must be justified by a significant state interest and must be narrowly drawn to further only that interest. In *Carey* v. *Population Services Int'l.,* 431 U.S. 678 (1977), this Court confirmed that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults", and said that "[s]tate restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult.'" *Id.* at 693, quoting *Danforth* at 75. If such restrictions do serve a significant interest, they must nonetheless be "narrowly drawn". *Roe* v. *Wade,* 410 U.S. at 155. Any interest proffered as supporting the statute must be judged by each of these tests: the interest must be significant; and the restrictions which purport to further it must be drawn narrowly.

The state's interest in a minor's abortion decision must, under the principles of *Roe* v. *Wade* and *Danforth*, be restricted to its traditional concern with a minor's capacity to consent to a medical procedure. Nothing in *Danforth, Bellotti, Carey* or *Maher* suggests any retraction of this rule. Thus, in *Danforth*, this Court left open only the question whether "every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy", *Danforth* at 75, and in *Bellotti I*, this Court explicitly identified its concern with that issue. *Id.* at 147.

In their Brief, appellants suggest three interests which they claim would meet the "significant state interest" test if that test is applied.[56] However, none of these interests justifies the burdens of the statute here.

A. *The Statute Is Not Limited to and Does Not Further the Alleged State Interest in Preventing "Improvident Decision Making".*

Appellants describe the first "significant state interest" supposedly served by the statute as a "desire to provide protection against improvident decision making related to a minor's immaturity or the other peculiar problems of adolescence and childhood". Brief for the Appellants, 37. Appellants do not elaborate on the phrase, but as parental rights apart from the minor's best interests cannot be recognized (*Attorney General* at 292), the phrase apparently means no more than that the state has an interest in insuring that a minor is capable of giving informed consent.

The traditional view that minors have "a lesser capability for making important decisions", *Carey* at 693 n.16,

[56] Initially, appellants (Brief, 16, 27-33) make the curious claim that the statute "does not affect a minor's fundamental right to make the abortion decision" at all. But that claim is rebutted by the facts found by the district court, which neither appellants nor intervenor-appellants suggest are clearly erroneous.

would arguably justify some special safeguards to ensure that the minor in fact has the capacity to understand the applicable risks and consequences in order to "give effective consent for termination of her pregnancy." *Danforth* at 75. The Massachusetts statute, however, not only fails to support the state interest in ensuring the capacity to give informed consent, but even works against it. And the statute plainly is not "narrowly drawn" to further only that interest, but rather sweeps far beyond it.

The statute makes no provision for determinations of capacity or parental consultation or judicial superintendence in the case of pregnant minors who elect to continue their pregnancies and have a child,[57] but, with respect to those minors who do wish to terminate their pregnancies, the statute then imposes restrictions without regard to whether the decision constitutes an informed consent. A determination of capacity to give informed consent is hardly furthered by a requirement of notice to both parents even when such notice is *against* the best interests of a minor. Nor does the provision for judicial override of a mature minor's informed consent have anything whatever to do with ensuring the capacity to give informed consent: the statute, as interpreted by the state court, does not direct the judge's inquiry to ascertaining the minor's capacity but rather to his independent view of her "best interests".

In Massachusetts, the state's common law and statutory mature minor rules already supply an entirely adequate mechanism to determine capacity to consent. Where

[57] Indeed, Massachusetts disavowed any interest in preventing an improvident decision to bear a child by enacting legislation that permits any pregnant minor who continues her pregnancy, regardless of maturity, to consent to medical treatment relating to bearing a child (*e.g.*, a Caesarian section) or to any other kind of medical treatment. Mass. G.L. c. 112, § 12F.

either of these rules applies, a minor is capable of giving consent to a medical procedure without notice to parents and without judicial intervention. *Attorney General* at 296, 302. Additionally, under Mass. G.L. c. 112, § 12F, an emancipated minor and an unemancipated pregnant minor are permitted to consent to all medical procedures except abortion and sterilization. Both by statute and by decisional law, Massachusetts has elected to protect its traditional interest in ensuring that a minor has capacity to consent to medical procedures *without* reliance on a chronological test[58] and *without* judicial involvement. The issue of informed consent is left to the judgment of medical personnel who may but are not required to seek judicial involvement in an appropriate case. *Attorney General* at 296.[59] Thus, the state has already established how consent should be assessed in order to determine that it is competent and fully informed. The state court recognized the accepted procedure in stating:

[58] Dissenting in *Danforth*, Mr. Justice Stevens noted that the Missouri parental consent statute was

> consistent with the predicate which underlies all state legislation seeking to protect minors from the consequences of decisions they are not yet prepared to make. In all such situations, chronological age has been the basis for imposition of a restraint on the minor's freedom of choice even though it is perfectly obvious that such a yardstick is imprecise and perhaps even unjust in a particular case. *Danforth* at 105-106.

This reasoning is inapplicable to Massachusetts, where the state has rejected chronological age as the basis of any general restraint on a minor's capacity to consent to medical procedures.

[59] Because the abortion decision is medical in nature, *Roe* v. *Wade*, 410 U.S. at 166, it is appropriate for a physician or other trained medical personnel to participate in determining the existence of informed consent. Although "peculiar problems of adolescence and childhood", Brief for the Appellants, 37, must be taken into account insofar as they are relevant to this determination, there was uncontradicted testimony that minors are better able to appreciate the consequences of having an abortion than of having a child. 2 App. 58.

> The grounds for consenting to an abortion under § 12[S] . . . are not different from the standards to be applied in determining whether some other medical procedure should be performed on a minor pursuant to § 12F. *In each instance,* a physician must exercise his or her *medical judgment* and the minor must consent to the procedure as being in his or her best interest. *Attorney General* at 300 (emphasis added).

The statute, however, does nothing to further the existing procedure for determining capacity to give informed consent. Instead, it substitutes irrational presumptions: any minor who chooses to have a child is conclusively presumed to have that capacity; and any minor who chooses to have an abortion is conclusively presumed to lack that capacity.

Moreover, the statute not only fails to assist in ensuring a capacity to give informed consent, but it even works against the basic principles of informed consent.[60] As the district court found, the statute as construed will deter many minors from exercising their constitutional right to

[60] This Court's approval, in *Danforth,* of a statute requiring written consent of the pregnant woman herself is distinguishable from this case on all four grounds on which the *Danforth* trial court had relied in upholding the statute:

First, the purpose of the written consent requirement there was to ensure "that the pregnant woman retains control over the discretions [sic] of her consulting physician";

Second, the requirement did not "single out the abortion procedure, but merely include[d] it within the category of medical operations for which consent is required";

Third, the consent requirement was "not burdensome or chilling"; and

Fourth, the requirement "in no way interposes the state or third parties in the decision-making process." *Danforth* at 66, quoting from the decision below in that case, 392 F. Supp. 1362, 1368, 1369 (E.D. Mo. 1975).

choose in favor of the abortion decision. For some, this will result in an unwanted pregnancy; for others it will result in resort to out-of-state or illegal abortions. In any event, the minor's choice will be influenced by extraneous burdens and harms imposed by the statute.

B. *The Statute Is Not Limited to and Is Not Justified by the Alleged State Interest in "Sanctioning" Parental Consultation.*

The second supposedly significant state interest identified by appellants (Brief, 37) is "a determination to sanction" parental consultation. Appellants offer no further explanation of what this "sanction" means, but presumably they mean that the state legislature wants to encourage pregnant minors who want abortions to consult with their parents.[61] Appellants may, accordingly, be relying on the suggestion of Mr. Justice Powell, writing for the majority in *Maher,* that a statute might be constitutional if it were to authorize the "less burdensome requirement of parental consultation" rather than a parental veto. 432 U.S. at 473.

But the Massachusetts statute goes well beyond a requirement of parental consultation. Consultation is simply the statutorily required first step, and it is required, not merely "sanctioned," in every case — however harmful in fact the forced consultation may be to the minor or to the family relationship.[62] Where consulta-

[61] This "consultation" may, of course, consist of nothing more than a courtroom confrontation.

[62] As the concurring opinion of Justices Stewart and Powell in *Danforth* suggests, a parental consultation statute would be overbroad and unduly burdensome if it required parental consultation in *every* instance where a minor seeks an abortion. This concurring opinion envisages the possibility of approving a statute which requires parental consent or consultation only "in most

tion fails to produce unanimous agreement, the statute gives the minor no alternative to seeking judicial consent, and it permits a judge to veto her choice, even if it remains her choice after parental consultation, even if it is an informed and reasonable choice, and, indeed, even if it is a choice in which one consulted parent concurs. In short, the suggestion made by Mr. Justice Powell in *Maher* does nothing to save the statute here.

Moreover, while it can hardly be disputed that "the views of parents . . . *may* have a beneficial influence (a) on the circumstances under which an abortion is to be performed . . . and (b) on the amount, source, and quality of post-operative assistance and counselling . . . which the minor will receive", *Attorney General* at 294 (emphasis added), the statute cannot have any such effect where the parents "hold strong anti-abortion convictions" (*Baird III* at 1001), and would "under no circumstances consent" (*Baird I* at 853). Nor is a lawsuit between a minor and her parents likely to produce this "beneficial influence." The statute is both overbroad in imposing burdens unrelated to encouraging parental consultation on a minor who would choose abortion and, at the same time, underinclusive in disregarding consultation with respect to the pregnancy continuation/termination decision whenever the minor's initial choice is continuation of her pregnancy. The decision confronting

cases," but which provides for judicial determination either "that the minor is mature enough to give an informed consent without parental concurrence" or "that abortion in any event is in the minor's best interests." *Danforth* at 90-91.

Dispensing with parental notice in such cases is what the district court described as "parents' bypass". The recognition of such cases reflects the fact that parental involvement does not necessarily enhance the decision-making process, particularly where consultation is forced upon the participants. *See Poe* v. *Gerstein,* 517 F. 2d 787, 792-793 (5th Cir. 1975), *aff'd sub nom. Gerstein* v. *Coe,* 428 U.S. 901 (1976).

a pregnant minor is not whether to have an abortion, but whether to have an abortion or have a child. The decision has "irrevocable consequences whichever way it is made." *Danforth* at 95 (White, J., dissenting). The decision should be made "with full understanding of the consequences of *either alternative*. . . . Whatever choice a pregnant young woman makes — to marry, to abort, to bear her child out of wedlock — the consequences of her decision may have a profound impact on her entire future life." *Id.* at 103 (Stevens, J., dissenting; emphasis added). The statute, however, does not in any way question or burden any minor's decision to continue a pregnancy. Her decision to bear a child, however immature or irrational or ill-informed or contrary to her best interests or contrary to her parents' wishes, is entirely unaffected by the statute. The statute is not designed to enhance the minor's chances to make the best decision "whichever way it is made." *Danforth* at 95 (White, J., dissenting). The statute is designed to restrict only a decision to abort.

C. *The Statute Is Not Limited to and Is Not Justified by the Alleged State Interest in Remedying the Purported Inadequacy of Counselling by Some Clinics.*

Appellants' third and final suggested state interest (Brief, 38) is that of remedying or compensating for "the willingness of some abortion clinics and physicians . . . to perform abortion surgery" without sufficient counselling. This interest may well be a significant one, but it does not justify the statute here, because it cannot seriously be argued that the statute is "narrowly drawn to express only the legitimate state interests at stake." *Roe* v. *Wade*, 410 U.S. at 156. If clinic and physician counselling is inadequate, that deficiency obviously might be met, for example, by requiring counselling by qualified medical personnel,

perhaps followed, if the end of the first trimester is not too near, by a very brief waiting period before the abortion is performed. *Cf. Danforth* at 66 (approving a patient consent requirement which " 'in no way interposes the state or third parties in the decision making process' ", quoting decision below, 392 F. Supp. at 1375). But it is obvious that requiring parental notification which is objectively against a minor's best interests cannot possibly protect against occasions of inadequate professional counselling. Nor does the statute's provision that a judge can overrule a mature minor's informed decision to choose the abortion alternative have any relation to the suggested state interest in preventing inadequate counselling. *See Zablocki v. Redhail,* 434 U.S. at 388-389.

In short, the Massachusetts statute imposes significant burdens upon a minor's privacy rights, and it is not justified by any of the state interests which appellants assert. The provisions for mandatory parental notice against a minor's best interests and for judicial override of a mature minor's informed choice bear no rational relationship to those asserted interests.[63]

III. The District Court Correctly Concluded that the Massachusetts Statute Impermissibly Discriminates Against a Mature Minor's Right to Decide Whether to Terminate Her Pregnancy in Violation of the Equal Protection Clause.

With respect to mature minors, the Massachusetts statute also denies equal protection of the laws, for substantially the same reasons that render it defective under due process analysis. The district court held that the stat-

[63] For an example of a state statute narrowly drawn to address the state's interest in encouraging parental consultation without mandating such consultation where harmful to the minor and without mandating judicial involvement, see the Maryland enactment, reproduced in pertinent part at Appendix A hereto.

ute's treatment of mature minors is "both an undue burden in the due process sense, and a discriminatory denial of equal protection." *Baird III* at 1004.

Under the equal protection clause, "[t]he basic framework of analysis . . . is well settled: 'We must decide, first, whether [state legislation] operates to the disadvantage of some suspect class or *impinges upon a fundamental right* explicitly or implicitly protected by the Constitution.'" *Maher,* 432 U.S. at 470, quoting *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973). Here, the statute unquestionably restricts the minor's constitutional right to decide whether to terminate her pregnancy. By reason of the statute, Massachusetts "has imposed . . . restriction[s] on access to abortions that [were] not already there." *Maher* at 474 (distinguishing, in equal protection terms, between encouragement of the pregnancy continuation choice by supplying government benefits, and discouragement of the pregnancy termination choice by imposing restrictions or burdens).

These restrictions must meet equal protection standards. "[T]he same test must be applied to state regulations that burden an individual's right to decide . . . as is applied to state statutes that prohibit the decision entirely." *Carey,* 431 U.S. at 688. Because the statute impinges upon a fundamental constitutional right, it must be justified by a "'significant state interest'", *Carey* at 693, quoting *Danforth,* 428 U.S. at 75, and must be implemented by "legislative enactments . . . narrowly drawn to express only the legitimate state interests at stake." *Roe* v. *Wade,* 410 U.S. at 155.

Under this strict standard of review, the interests asserted by the state in support of the statute (other than insuring a minor's capacity to consent) are not significant, and the classifications imposed by the statute are not narrowly drawn to conform to the state interests they purport to serve. Indeed, several of the discriminatory re-

strictions which result from the statutory classification scheme cannot be justified by any rational analysis.

A. *The Statute Impermissibly Discriminates Among Classes Similarly Situated.*

1. *The statute impermissibly discriminates between mature minors and adults.*

The district court properly found "no reasonable basis for Massachusetts distinguishing between a minor and an adult, given a finding of maturity and informed consent." *Baird III* at 1004. Yet the statute distinguishes between mature minors and adults in two respects: *first,* it mandates notice to both parents for mature minors, but not for adults; *second,* and, more intrusively, it permits a judicial override of a mature minor's informed consent to an abortion, but not of an adult's.

The essence of this Court's decisions in *Roe* and *Danforth* is that the decision of an adult woman whether to terminate her pregnancy is one to be made solely by the woman in consultation with her physician. Whether an adult woman's decision to terminate her pregnancy is prudent or wise or in "her best interests" is emphatically not a judgment to be made by her spouse, her parents, or a judge, even though some adult women undoubtedly will choose imprudently or unwisely or even, from a third party's view, against their best interests. "[T]he State cannot delegate authority to any particular person, even the spouse, to prevent abortion during [the first trimester]." *Danforth* at 69.

The district court correctly concluded that a minor stands constitutionally in the same position as an adult, but for "the special consequences of her minority — immaturity and the lack of informed understanding." *Baird III* at 1003; *see Danforth* at 75 (state restrictions on mi-

nors' rights to obtain an abortion are valid only if they serve "any significant state interest . . . *that is not present in the case of an adult.*") (emphasis added); *accord, Carey* at 693. In the absence of these disabilities associated with youth — when the minor is found to be mature and fully informed — there is simply no justification for the state's treating the minor any differently from a young adult. In other words, the state's special interest in protecting the minor from the consequences of "immaturity and lack of informed understanding" is exhausted once it is found that the minor is in need of no greater protection than the adult.[64] For the state to persist, after finding a minor to be mature and informed, in distinguishing between that minor and an adult is without even a rational basis and is impermissible.

2. *The statute impermissibly discriminates between mature minors seeking an abortion and those seeking medical care under the Massachusetts common law mature minor rule.*

The statute imposes restrictions upon mature minors seeking abortions which are not present under the common law when a mature minor seeks other medical care. The state court described the scope of the Massachusetts "mature minor rule" in the following language:

> [A]part from statutory limitations which are constitutional, where the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth. In such a case . . . judicial involvement is not required . . . . *Attorney General* at 296.[65]

[64] The distinction between the treatment of minors and adults cannot in Massachusetts be defended by reference to the economy and efficacy of adopting a "bright line" chronological test of maturity, because the Massachusetts statutory scheme already contemplates a procedure for *ad hoc* determinations of maturity. The impermissible burdens of mandatory parental notice and possible judicial override are imposed by the statute even where a judge has already made the *ad hoc* judgment that the minor in question is mature and capable of giving an informed consent.

Thus, absent special statutory restrictions, no mature minor would be compelled to seek court permission to obtain an abortion, and no mature minor would be compelled to notify her parents of her decision when her physician agreed that such notification would be against her best interests. This mature minor rule is completely unrelated to chronological age.

Appellants' argument (Brief, 46) that the limited Massachusetts common law mature minor rule generally requires the minor to obtain "parental *consent*" rather than merely to *consult* her parents is incorrect. (Emphasis added.) Although a literal reading of the state court's opinion might appear to support that statement of the rule, the court must have meant that parental *consultation* is required except when it would be against the minor's best interest. Its discussion of the topic is headed "Parental *Consultation* as a Requirement" (*Attorney Gen-*

[65] It is insignificant that the Massachusetts mature minor rule also requires the physician to be satisfied that the minor's best interests will be served by not notifying the parents. There is no good reason not to notify parents unless the minor's best interests dictated otherwise: a prudent physician would surely rather have parental consent if obtainable, than rely solely on a mature minor rule as a defense in a battery suit. But the district court was certainly aware of the limitation, as it expressly quoted it:

> [The state court] went on to state that, but for the statute, the mature minor rule would permit an informed consent "where the best interests of a minor would be served by not notifying . . . her parents." 360 N.E. 2d at 296. *Baird III* at 1003.

eral at 293; emphasis added), and is responsive to the district court's inquiry whether, in some instances, a minor may obtain an abortion " 'without parental *consultation*'?" (*id.* at 293 n.6; emphasis added). It repeatedly refers to "parental involvement" or "parental consultation" or "notifying" parents (*id.* at 293-297). If, as appellants argue, the mature minor rule announced by the state court required parental *consent* in most cases, rather than merely *consultation,* the rule would be flatly contrary to *Danforth,* at least as to mature minors. Inasmuch as the state court specifically noted the *Danforth* holding (*Attorney General* at 291), and announced the rule in recognition of the fact that "the case for a mature minor rule has particular force" when the medical procedure is one to which "the minor may be entitled by constitutional right" (*Attorney General* at 296), the state court surely did not intend to state a rule which *Danforth* held to be patently unconstitutional.

The constitutionality of the distinction drawn by the statute between consent to abortion procedures on the one hand, and the common law requirements with respect to consent to other medical procedures on the other hand, depends, in the first instance "upon its degree." *Bellotti I* at 150. The degree of the distinction is now established: parental notice even when contrary to the minor's best interests, judicial proceedings, and a judge's possible overriding of the decision of the mature minor are burdens imposed in all cases where a mature minor's parents have not consented to an abortion; these burdens are absent at common law.[66]

[66] Appellants confuse two quite different concepts when they argue (Brief, 46) that both the common law and § 12S require inquiry into the minor's "best interests." The "best interests" test of the Massachusetts common law mature minor rule is a test applied by a physician to determine whether parental notice is inconsistent with a mature minor's best interests. (For abortions, however, parental notice is required by the statute in every case.)

3. *The statute impermissibly discriminates between mature minors seeking an abortion and those seeking other medical care under the Massachusetts statutory mature minor rule.*

Apart from the Massachusetts common law mature minor rule, the state legislature has also created a statutory mature minor rule. Massachusetts General Laws c. 112, § 12F was characterized by the state court as "a legislative mature minor rule (or perhaps an emancipated minor rule, or both), allowing consent for most medical and dental care." *Attorney General* at 296 n.9. Under the statutory rule, a married or previously married minor may consent to any medical or dental care, including an abortion or sterilization. Five other categories of minors, including pregnant minors,[67] are authorized to consent to any such care other than abortion or sterilization. In all such cases, chronological age is irrelevant.

Under § 12F, therefore, minors who fit any of the categories described may consent to such procedures as Caesarian sections, bone marrow transplants, kidney transplants or donations, amputations, open heart surgery, hysterectomies and mastectomies, or other serious medical procedures described by the district court as "more complicated and dangerous" than abortion. *Baird III* at 1003-1004. Unless married or previously married, however, such minors may not consent to the relatively simple and risk-free procedure of a first trimester abortion. This plainly discriminates against the mature unmarried preg-

The "best interests" test of the statute's judicial override rule is applied by a judge to determine whether to reject a mature minor's informed choice of an abortion as, in his view, against her best interests.

[67] The fourth classification of minors in § 12F who are authorized to consent to medical or dental care is the minor who "(*iv*) . . . is pregnant or believes herself to be pregnant."

nant minor as compared with any married or previously married minor. And it discriminates against the mature unmarried pregnant minor who chooses an abortion procedure as compared with all such minors who choose any other medical procedure.

Appellants suggest (Brief, 47) that the state court's opinion offered a method of construing § 12S and § 12F together in a way that would eliminate the discrimination, although appellants do not discuss the state court's analysis of this issue, and the state court's discussion itself is unclear. *See Attorney General* at 303. It appears, however, that the state court, to avoid an unconstitutional discrimination, would construe § 12F to mean that one of the six listed classes of "emancipated minors" — the married or previously married minor — would, like the other five classes described in the statute, be excluded from giving consent to abortion or sterilization. Thus, notwithstanding the express language of the third paragraph of § 12F which excludes only the other five categories of mature or emancipated minors from the right to consent to abortion or sterilization, married or previously married minors would also be excluded, and the statute's provision that "a minor may give consent to [her] medical . . . care" would be construed, in the pregnancy context, "to apply only to certain medical procedures associated with a determination of pregnancy and counseling concerning abortion." *Attorney General* at 303.

This forced construction of § 12F would, of course, eliminate the irrational distinction based on marital status[68] which is expressed in § 12F itself. However, it

[68] Marital status does not affect a minor's maturity in fact. At common law, marriage merely emancipated the minor from parental control; it did not confer capacity generally, nor remove other disabilities of minority, such as the inability to make an enforceable contract. *Commonwealth* v. *Graham*, 157 Mass. 73, 76 (1892); *Taunton v. Plymouth*, 15 Mass. 202, 203 (1818). Thus, it is irrational, and does not promote wise and prudent decision making, to impose greater burdens on a mature unmarried minor than are imposed on the married immature minor. *State* v. *Koome*, 84 Wash. 2d at 903, 530 P. 2d at 262; *cf. Carey* at 685; *Eisenstadt* v. *Baird*, 405 U.S. at 453. *But see, Baird III* at 1018 (Julian, J., dissenting).

does not address the fact that § 12S *also* provides that a minor married or previously married is not subject to its strictures.

Moreover, even were the statute susceptible of a construction which would eliminate the marital status distinctions, the state court's suggested construction of § 12F would not eliminate the discrimination visited upon minors "emancipated" under § 12F (regardless of marital status) who wish to decide in favor of an abortion as compared to (i) such minors who wish to bear a child or (ii) such minors who wish to submit to another medical procedure. Indeed, the state court acknowledged as much, in stating that if these distinctions were found to be invalid under the equal protection clause, the state court would then, of necessity, construe § 12S's parental and judicial approval provisions as not applicable to the classes of minors enumerated in the statutory mature minor rule. *Attorney General* at 303: "If the distinction between pregnancy-related operations and other operations cannot withstand an equal protection challenge . . . the parental (and judicial) consent provisions of § 12[S] must fail insofar as is necessary to eliminate the constitutional defect . . . ."

B. *The Discriminatory Classifications Imposed by the Statute Are Not Justified by Any Significant State Interest, Nor Are They Narrowly Drawn.*

Recognizing the essential similarity of due process and equal protection analysis in this case, appellants do not

separately describe in equal protection terms the allegedly significant state interests which they proffer as justification for the statute. As has been shown (Argument II, ante), none of these three interests — protection against improvident decision making; "sanctioning" of parental consultation; and compensating for inadequate clinic counselling — justifies the restrictive burdens which are *uniquely* imposed upon the mature unmarried pregnant minor who wishes to decide in favor of the abortion choice.

Further, with respect to the statutorily-imposed requirement of notice to both parents in all cases and provision for "judicial override", the discriminations imposed by the statute do not meet even "the less demanding test of rationality that applies in the absence of . . . the impingement of a fundamental right." *Maher* at 478.[69] Notifying a pregnant minor's parents of her decision in favor of the abortion choice and giving them an opportunity to oppose it in court is hardly a rational means of furthering "the state interest in encouraging normal childbirth" (found in *Maher* at 479 to meet the rationality test), particularly in cases where that notice is objectively and factually *against* the minor's best interests. Similarly, there is at best the thinnest rational relationship between this state interest and the substitution of what even the dissenting judge in the district court described as "the arbi-

[69] *Maher*, of course, held only that classifications for allocation of welfare funds "survive equal protection challenge when a 'reasonable basis' for the classification is shown", that "the state interest in encouraging normal childbirth" provided such a basis, and that this state interest, under rational basis analysis, justifies a state's unwillingness to subsidize the "termination of a potential human life" absent a showing of medical necessity. *Maher* at 478-480. This state interest may not, of course, be furthered by "direct obstacles — such as criminal penalties." *Colautti v. Franklin*, — U.S. —, No. 77-891, slip op. at 7 n.7 (Jan. 9, 1979).

trary will of the [state superior court] judge." *Baird III* at 1015. To be sure, the state's interest in encouraging normal childbirth justifies steps to assure the availability of adequate medical care for pregnant minors, but it cannot justify the imposition of significant burdens on any pregnant woman who, in the first trimester, competently elects to end her pregnancy.

Measuring the statute by the requirement that it be "narrowly drawn to express only the legitimate state interests at stake," *Roe* v. *Wade*, 410 U.S. at 155, the substantial overbreadth of the statute with respect to each of the three supposed state interests which appellants have cited in its support has already been demonstrated (*see* Argument II, ante). Nor is the statute narrowly drawn to meet the minimal state interest in encouraging normal childbirth. This interest would be vindicated in its full legitimate scope by recognition of a mature minor rule (which would permit mature minors to consent to necessary medical care) coupled with an absolute requirement of fully informed consent by the minor herself, before any abortion might be performed. *Cf. Danforth* at 65-67 (patient consent requirement sustained).

Finally, the statute not only is overinclusive in imposing restrictions on mature unmarried pregnant minors who decide in favor of abortion, but also is underinclusive in doing nothing to prevent improvident decision making or to encourage parental consultation by the unmarried pregnant minor who wishes to decide in favor of having a child. The minor who continues her pregnancy is certainly no less in need of counselling and guidance than a similar minor who decides in favor of abortion. Yet the statute does nothing to provide counselling in the former case. This underinclusiveness exposes the hypocrisy of the state's advocacy of these purported interests and un-

derscores the correctness of the district court's holding that the statute works not only an undue burden but also, as to mature minors, "a discriminatory denial of equal protection." *Baird III* at 1004.

IV. The District Court Properly Concluded that the Massachusetts Statute Was Invalid on Its Face and Enjoined Its Enforcement as to All Minors.

A. *Because the Claims of All Minors to Whom the Statute Applies Were before the District Court, the Statute Was Properly Invalidated on Its Face.*

The district court properly employed a facial analysis of the statute's constitutionality because the claims of all persons to whom the statute applies were before the court and were not hypothetical. Where the statute unconstitutionally burdened the rights of those persons, it was properly invalidated on its face.

Appellants argue that a facial analysis of the statute was improper because the claims of immature minors were not before the district court.[70] On the record below, the claims of all minors were in fact before the district court.[71]

[70] The "Questions Presented" by appellants expressly state that one question on appeal is whether the statute "violates the constitutional rights of certain minors . . . *e.g.*, those incapable of giving 'informed consent'." Jurisdictional Statement at 5.

[71] Appellees' intention *not* to waive immature minors' claims was twice expressly confirmed by counsel for appellees. 2 App. 472, 475. Even if appellees had tried to waive the claims of immature minors, the district court quite properly indicated its unwillingness to accept such a waiver. *Baird III* at 1001 n.6. In managing a class action suit, the district court is obliged to take appropriate supervisory action to protect absent class members. Fed. R. Civ. P. 23(d)(3), (5). Any dismissal of the action, in whole or in part, must be approved by the court. Fed. R. Civ. P. 23(e). The court may also permit intervention by a party who will better protect those interests. 3B *Moore's Federal Practice* § 23.73 at 23-495.

The district court certified a plaintiff class which was represented by Dr. Zupnick and Parents Aid Society. *Baird I* at 852. Those representatives were held to have standing "to attack the statute as applied to *all* minors, at least insofar as it requires the consent of both parents." *Id.* (emphasis added). The court later confirmed that immature minors were within the scope of the class represented by Dr. Zupnick. *Baird III* at 1001 n.6.[72] Plaintiffs stipulated that their attack was a facial one, 2 App. 213, and counsel for appellants informed the court that he considered the case to be a facial attack on the statute with respect to every woman to whom the statute applied, including minors "not capable of conception [consent?]". 2 App. 477-78. Because the statute purports to regulate all unmarried minors[73] and because all persons within the scope of the statute were challenging it, a facial analysis was plainly proper.

Even were Dr. Zupnick not a class representative *per se*, he, as a physician facing likely prosecution, has standing to assert all minor patients' claims, just as did the physician in *Danforth*. *Danforth*, 428 U.S. at 62. The standing of a physician to raise his patients' constitutional rights has been repeatedly affirmed in the context of challenges to statutory restrictions on abortion. *E.g.*, *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973). For purposes of

[72] Contrary to appellants' assertion (Brief, 50), the "Motion to Certify Plaintiffs Classes" was limited to mature minors only with respect to the class represented by Mary Moe. (*See* p. 43 of the Appendix in *Bellotti I.*)

[73] Relying on the fact that the statute also requires the minor's own consent, appellees have argued that the statute by its terms only applies to minors capable of giving consent or "mature" minors. 1 App. 426. Inasmuch as the district court found the statute to be applicable to "all minors" (*Baird I* at 852), it is argued herein that the statute is also unconstitutional as to immature minors.

a facial attack, whether immature minor's claims were before the court by virtue of Dr. Zupnick's class representative status or by virtue of his standing to raise such claims is of no consequence. *See Singleton* v. *Wulff*, 428 U.S. 106, 117-118 (1976).

Because the claims of immature minors were properly asserted by the physician plaintiff, this is not a case involving first amendment overbreadth analysis. Here, the third parties are not hypothetical; they are represented by the class representatives; and their rights are indeed at stake in the proceeding.[74] The district court correctly concluded "[n]or do we agree with defendants that this is a case of parties seeking relief for overbreadth improperly affecting others, not before the court." *Baird III* at 999.

Immature minors themselves have significant constitutional claims in this case, including claims concerning the burden of obtaining both parents' consent, or failing that, the burden of undertaking judicial proceedings and notifying both parents thereof; and the burden of a statute whose broad language increases the likelihood of improper parental refusals.

Recognition of the "chilling" or deterrent effect of a statutory scheme is plainly appropriate in considering whether undue burdens have been placed on rights of reproductive privacy. *See Carey*, 431 U.S. at 688; *Bellotti I* at 147. This Court has itself expressly considered the deterrent effect of a statute under a claim that it invades privacy rights. *E.g., Whalen* v. *Roe*, 429 U.S. 589, 602-603 (1977). In *Danforth*, Mr. Justice Stewart also considered

[74] *See* Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 423-424, 438-440 (1974); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 847-848 (1970) (both notes distinguishing overbreadth claims from true *jus tertii* claims).

whether, under one section of the challenged statute, "a physician's professional decision to perform an abortion will be 'chilled'." *Id.* at 89; *accord, Colautti* v. *Franklin*, — U.S. —, No. 77-891, slip op. at 14 (Jan. 9, 1979) (Pennsylvania abortion statute has "chilling effect on the exercise of constitutional rights."); *see also id.* at 17.[75]

In employing a facial analysis of the statute and rejecting appellants' proposed "as applied" analysis, the district court followed the established precedent of this Court. At no time has this Court examined statutes in abortion cases under an "as applied" analysis. *See, e.g., Colautti* v. *Franklin, supra; Maher* v. *Roe*, 432 U.S. 464 (1977); *Danforth, supra; Roe* v. *Wade*, 410 U.S. 113 (1973); *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Facial invalidation was also appropriate in view of the extent of the statute's infirmities. Not only is the statute infirm as to immature minors, but it must fall as to all mature minors, whose abortions constitute the vast majority of cases to which the statute is likely to apply.[76] In

[75] The district court's use of the term "chilling effect" hardly demonstrates that the court applied first amendment overbreadth analysis in this case. On this point, appellants confuse differing doctrines. "Chilling effect" is a doctrine of substantive law concerned with burdens which discourage the exercise of fundamental rights, as well as a doctrine of first amendment overbreadth. *See M.S.* v. *Wermers*, 557 F. 2d at 176 ("chilling effect" on effort to vindicate privacy right).

Indeed, the use of the term "overbreadth" in abortion rights cases to refer to a legislature's failure to enact narrowly drawn statutes is not uncommon. *See Danforth* at 59, 83-84 (affirming holding below that statutory provision was "unconstitutionally overbroad").

[76] Appellants' contention to the contrary is based on a chart (Brief, 67) which the district court accurately characterized as "fanciful". *Baird III* at 1001. Appellants' chart fails to be an accurate representation of anything. As set forth in the Statement of Facts, ante, 91% of all abortions are performed in the first trimester, and about ¾ of all abortions on minors are on

addition, as argued post, there are no savings constructions or excisions available and appropriate.

B. *It Would Have Been Improper for the District Court to Have Rewritten the Statute as Appellants Urge.*

Appellants suggest that this Court "should accept the invitation" of the Massachusetts legislature and the state court to construe the statute in whatever way necessary to permit it to be enforced in some form. Brief for the Appellants, 62. *See also id.*, 58, 60. Their suggestion — which they candidly admit is "unusual" (Brief, 58) — has no virtues and many vices.

Even if the statute might have been susceptible to a savings construction at one time, that option has been foreclosed by the state court's authoritative construction. Certainly this is a harder case for a savings construction than *Roe* and *Danforth,* where, even in the absence of state court decisions construing the state legislation at issue, this Court declined to attempt any savings construction. In this case, by contrast, the state court has answered certified questions clearly and unambiguously. *Attorney General* at 303 (summarizing state court's conclusions).

16-and 17-year-olds. Further, as to second trimester abortions, certain requirements of the statute such as parental notice when against the minor's best interests and judicial override of a mature minor's informed decision are not even reasonably related to maternal health. Finally, as to third trimester abortions, allowed only to preserve the life or health of the pregnant woman, Mass. G.L. c. 112, § 12M, the best interests of the minor would seem to require, almost by definition, that in such a life- or health-threatening case the abortion be performed without delay and burdens imposed by § 12S. *Cf.* Mass. G.L. c. 112, § 12Q (permitting a physician to dispense with § 12S consent requirements only in the case of "an emergency requiring immediate action").

1. *The district court lacked power to displace the authoritative construction of the statute by the state court.*

As this Court has repeatedly held, a construction of a state statute by the state's highest court is binding on a federal court subsequently reviewing the statute's constitutionality. *Mullaney* v. *Wilbur,* 421 U.S. 684, 691 (1975); *NAACP* v. *Button,* 371 U.S. 415, 432 (1963); *Winters* v. *New York,* 333 U.S. 507, 514 (1948); *Hebert* v. *Louisiana,* 272 U.S. 312, 316-17 (1926); *Murdock* v. *City of Memphis,* 20 Wall. 590 (1875). "In dealing with state laws, the [federal] Court cannot simply substitute a saving reinterpretation of a statute for that authoritatively given the statute by that state's highest court." Tribe, *American Constitutional Law* 717 (1978) (and authorities there cited).

This principle reflects limits on federal judicial power which cannot, as appellants suggest, be waived.

> Even assuming that a more explicit limiting interpretation of the ordinance could remedy the flaws we have pointed out — a matter on which we intimate no view — we are without power to remedy the defects by giving the ordinance constitutionally precise content. *Hynes* v. *Mayor of Oradell,* 425 U.S. 610, 622 (1976).

Accord, Gooding v. *Wilson,* 405 U.S. 518, 520 (1972). This Court attributed its similar refusal to rescue a state statute, judged unconstitutional in *Freedman* v. *Maryland,* 380 U.S. 51 (1965), to a lack of "jurisdiction to authoritatively construe state legislation." *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, 369 (1971).

In addition, for this Court to displace the state court's interpretation would violate the doctrine of abstention. The major premise of abstention is that the "last word" on the state statute's content "belongs neither to us nor to the district court but to the Supreme Court" of the

state. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 499-500 (1941).

In light of the history of this case, the state court's interpretation of legislative intent has particular weight. The state court's construction was in spite of appellants' vigorous urgings to the contrary. Appellants had urged upon the state court the very "savings" constructions which they now offer to this Court — construing the statute to be inapplicable to mature minors in the first trimester, to contain no judicial power to override a mature minor's informed decision, and to allow a best interests exception to the parental consent/consultation requirement. *Compare* Brief for the Appellants, 60 *with Attorney General* at 294-296. Appellants' urgings were reinforced by this Court's prior opinion, which quite explicitly described the "picture" of the statute that had persuaded the justices to abstain with the suggestion that, if so construed, the constitutional problems raised by the statute would be materially changed. *Bellotti I* at 145, 147. Nonetheless, the state court adopted the negative of that "picture", compelled by its determination of the legislature's intent and despite its claim to be applying the principle of construing the statute to avoid constitutional problems. *Attorney General* at 291. The state court has made a binding determination that appellants' proposed constructions are simply not consistent with the statutory intent. *Attorney General* at 294-295.[77]

In view of the state court's unambiguous constructions of the statute, appellants' suggestion that this Court ignore these constructions and construe the statute differently amounts in this case to a suggestion that the Court determine and advise as to the constitutional outer limits

[77] For example, "[t]he legislature has left no room to apply a mature minor rule where an unmarried minor seeks an abortion without parental consultation." *Attorney General* at 294.

of parental consultation or consent that a state legislature may be permitted to impose.[78] Because this Court does not give advisory opinions or rule on hypothetical statutes or cases, appellants' unusual suggestion must be rejected. *See Flast* v. *Cohen*, 392 U.S. 83, 96 (1968).

2. *The district court properly invalidated the entire statute under well-established principles of statutory construction.*

The district court correctly declined to essay any savings construction for the statute. Violation of the statute is punishable as a *criminal* offense. Mass. G.L. 112, §§ 12Q, 12T. Accordingly, such a statute must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden". *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). It also must not "encourage arbitrary and erratic arrests and convictions." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972). Savings constructions may not be so strained as to render a statute's meaning unacceptably indefinite where criminal penalties are possible. Here, the judicial revision which would be required would be so extensive that "the statute no longer [gives] an intelligible warning of the conduct it [prohibits]." *United States* v. *Raines*, 362 U.S. 17, 22-23 (1960),

[78] Appellants apparently base their suggestion on the state court's statement that "§ 12[S] must be construed to require as much parental consultation as is permissible constitutionally." *Attorney General* at 294. Because one of the state court's answers to certified questions was the flat statement "[p]arental consultation is required in every instance where an unmarried minor seeks an abortion" (*id.* at 303), the district court correctly observed: "[a]lthough the statute is not ours, the Massachusetts court has, in effect, given us the coloring-book. . . . [W]e must doubt our authority to fix terms of a state statute contrary to the prima facie interpretation given it by the state court." *Baird III* at 1006.

citing *United States* v. *Reese,* 92 U.S. 214, 219-220 (1876).[79]

Similarly, savings constructions may not be used where the statute's resulting indefiniteness would impinge upon fundamental rights. "[A]n attempt to 'construe' the statute and to probe its recesses for some core of constitutionality" is unacceptable if that construction "would inject an element of vagueness into the statute's scope and application" and "the plain words would thus become uncertain in meaning. . . ." *Aptheker* v. *Secretary of State,* 378 U.S. 500, 516 (1964) (right to travel). "This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Colautti* v. *Franklin, supra,* slip op. at 11.

In such circumstances, this Court has repeatedly declined to fashion substitute legislation. In *United States* v. *Reese,* 92 U.S. 214 (1876), this Court struck down a federal criminal statute rather than limit its general provisions because "[t]o limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." *Id.* at 222. The concerns expressed in *Reese* more recently prevented the judicial rescue of a federal statute in *Blount* v. *Rizzi,* 400 U.S. 410, 419 (1971). As explained in a subsequent decision, "salvation of that statute [in *Blount*], however, would have required its complete rewriting in a manner inconsistent with the expressed intentions of some of its authors." *United States* v. *Thirty-Seven Photographs,* 402 U.S. at 369. *See Interstate Circuit*

[79] Physicians' fears of being prosecuted under the statute are far from groundless in Massachusetts. The district court found that there would be extensive pressure on state law enforcement officials to prosecute under the statute and that it was "highly improbable that they would not immediately respond to such pressures." *Baird I* at 852. *See, e.g., Commonwealth* v. *Edelin,* Mass. Adv. Sh. (1976) 2795, 359 N.E. 2d 4 (dismissing conviction of physician for manslaughter in failing to preserve fetal life).

Inc. v. City of Dallas, 390 U.S. 676, 690 (1968) ("It is not our province to draft legislation.").[80]

Appellants' suggestion that the statute's plain meaning based on the statutory scheme and legislative intent, as found by the state court, may be superceded by some other meaning dictated by constitutional necessity, is misguided. In purporting to apply the maxim that savings constructions are preferred, appellants bypass the threshold inquiry mandated by that maxim — "whether a construction of the statute is *fairly possible* by which the [constitutional] question may be avoided." *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932) (emphasis added). As a result, appellants would reduce the statutory scheme and legislative intent to a convenient fiction that can be shaped to fit any constitutional requirement.[81] As Mr. Justice Harlan once stated in a re-

[80] The suggestion made by appellants (Brief, 60) of construing the statute to be inapplicable to mature minors in the first trimester is particularly unsatisfactory because the statute would impose criminal liability on a physician who errs in his determination of maturity. Mass. G.L. c. 112, § 12T. Neither § 12T which makes violations of § 12Q criminal, nor § 12Q which prohibits physicians from performing abortions on minors without § 12S consents, nor § 12S itself contains any "good faith" defense. (*Compare* § 12F, which provides for such a defense in other circumstances.) Experts disagree here as to when maturity occurs (*Baird I* at 54), as experts disagreed in *Colautti* (*supra* at 16) as to when fetal viability occurs. Here, as there, "[t]he perils of strict criminal liability are particularly acute because of the uncertainty of the viability [here maturity] determination itself." *Colautti* v. *Franklin, supra* at 16. Thus, even if the statute were construed as appellants suggest, physicians would undoubtedly direct minors to obtain both parents' consent or judicial approval in every case, rather than risk prosecution for a mistaken assessment of maturity. *See People* v. *Belous,* 71 Cal. 2d 954, 963, 973, 458 P. 2d 194, 197-198, 206 (1969).

[81] The district court aptly described this unusual approach as follows: "The Massachusetts court . . . suggests reading into the statute affirmative provisions made out of nothing but a generally announced purpose to pass constitutional muster. In so doing, the court seems to have found the ultimate remedy for all constitutional infirmities. If a statute which, in terms, requires parental

lated context, a statute "is not an empty vessel into which this Court is free to pour a vintage . . . ." *United States* v. *Sisson*, 399 U.S. 267, 297 (1970), cited approvingly in *National Broiler Marketing Ass'n.* v. *United States*, 436 U.S. 816, 827 (1978).

This Court has scrupulously avoided both constructions which cannot be fairly borne by the statutory language and constructions which are not supported by the statutory intent as expressed in the text of the statute.[82] *E.g., American Communication Ass'n* v. *Douds*, 339 U.S. 382, 415, 421-422 (1950) (Frankfurter, J., concurring in part, dissenting in part) ("I deem it my duty to go to the furthest limits in so construing legislation as to avoid a finding that Congress has exceeded the limits of its powers. . . . But what Congress has written does not permit such a gloss nor deletion of what it has written."). Similarly, in *United States* v. *UAW*, 352 U.S. 567, 958 (1957), this Court was unable to apply

> "the cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the constitution is to be preferred." *Knights Templars' & M. Life Indemnity Co.* v. *Jarman*, 187 U.S. 197, 205. The case before us does not call for its application. Here only one interpretation may be fairly derived from the relevant materials. The rule of construction to be invoked when constitutional problems lurk in an ambiguous statute does not permit disregard of what Congress commands.

See generally Note, *Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions*, 53 Colum. L. Rev. 633, 646-649 (1953).

Finally, the district court's invalidation of the statute is entirely consistent with the approach this Court has applied to other facial attacks on state statutes that restrict abortion. *E.g., Colautti* v. *Franklin, supra; Danforth, supra*; *Roe* v. *Wade, supra.* In each case, the statute or pertinent section was struck down. As this Court stated in *Roe* v. *Wade*, the abortion statutes in controversy "as a unit, must fall". 410 U.S. at 166. In neither *Roe, Danforth* nor *Colautti* did this Court suggest reading into the state legislation at issue a possible savings construction.

V. The District Court Did Not Commit Reversible Error in Issuing Certain Procedural Orders Denying Discretionary Discovery and Allocating Costs.

A. *The District Court Did Not Err in Denying Appellants' Motion for Leave to Conduct a Survey of Plaintiffs' Class.*

Appellants' argument that the district court committed reversible error in denying their motion, as discovery was closing, to conduct a survey of the plaintiff class of health care providers is insubstantial. The issues raised by the motion were completely within the discretion of the trial court, and there was no abuse of that discretion.

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consultation without exception, can be 'construed to require as much parental consultation as is permissible constitutionally', here, at once, is an instant cure, both for overbreadth, and for lack of standards. Regardless of whether a statute says too much, or too little, so long as the legislature intended it to be constitutional, when it comes before a court it will be appropriately rewritten. With due respect, we cannot believe this to be possible." *Baird III* at 1005-1006.

[82] The relevant determinants of statutory intent are the statute's provisions, not its title. Neither the title nor the severability clause constitutes statutory authority for the federal courts to disregard the more specific provisions that follow or grants carte blanche to the federal courts to supply all the missing details.

Appellants must bear a very heavy burden to show that a pretrial discovery order justifies reversal of a post-trial final judgment on the merits.

> A district court has very wide discretion in handling pretrial discovery and we are most unlikely to fault its judgment unless, in the totality of the circumstances, its rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case.

Voegeli v. *Lewis,* 568 F. 2d 89, 96 (5th Cir. 1977); *accord, Data Disc, Inc.* v. *Systems Technology Associates, Inc.,* 557 F. 2d 1280, 1285 n.1 (9th Cir. 1977) (must show "substantial" prejudice).

The district court gave no reasons for denial of the motion, nor was it required to, but the first and most obvious reason is lack of timeliness. Appellants' motion, if allowed, would have delayed proceedings in a case where, as this Court observed, "[t]he importance of speed in resolution of the instant litigation is manifest." *Bellotti I* at 151. The motion was not filed until August 1, 1977. 1 App. 44. Discovery for the trial in *Baird III* had commenced on Feb. 22, 1977 (1 App. 29), and was extensive. 1 App. 29-53. At hearings on April 5 and 13, 1977, the court directed the parties to meet concerning a discovery and deposition schedule. On April 12, 1977, appellants filed an extensive "Initial Statement of Disputed Material Facts", which suggested that consent practices were an issue in their view, but appellants then did nothing about pursuing discovery on that topic for several months. 1 App. 125-140. On July 13, 1977, the district court ordered that a pretrial conference be held on August 22, 1977 and that "all pretrial discovery will be completed by Friday, August 19, 1977." 1 App. 41-42. On July 20,

1977, the district court gave appellants the unusual privilege of being permitted to take depositions of plaintiffs' experts. 1 App. 43. Only after all this, did appellants file their motion for a survey. It was not an abuse of discretion for the district court to reject this last minute discovery request. *Aviation Specialties, Inc.* v. *United Technologies Corp.,* 568 F. 2d 1186, 1189 (5th Cir. 1978); *Allen* v. *First National Bank of Atlanta,* 169 F. 2d 221, 224 (5th Cir. 1948); *Cinerama, Inc.* v. *Sweet Music, S.A.,* 355 F. Supp. 1113, 1120-1121 (S.D. N.Y. 1972), *aff'd,* 493 F. 2d 1397 (2d Cir. 1974).

The district court's denial of the motion was proper for other reasons as well. Contact by opposing counsel of absentee class members rests in the trial court's discretion, which should be exercised to avoid any unfairness.[83] *Chrapliwy* v. *Uniroyal, Inc.,* 71 F.R.D. 461, 464 (N.D. Ind. 1976); *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.,* 455 F. 2d 770, 775 (2d Cir. 1972).

Additionally, there would have been ample cause for the district court, in its discretion, to have excluded evidence as to the results of the proposed survey. The proposed survey, set forth at 1 App. 284-292, was to be made by counsel for appellants in the form of a letter, attached questionnaire and an instruction sheet, to be mailed to members of the health care provider class with responses returned by mail. The cover letter explained that the Attorney General was conducting the survey in relation to this law suit. The questionnaire, which did not distinguish between mature and immature minors, sought information on practices for parental consent to abortion and other medical procedures for minors, and requested justification for the particular practices used. 1 App.

[83] The district court could reasonably have considered the potential mischief to be worked by an entirely unexpected letter

291. The survey appears to have been prepared by counsel; no representation was made that it was prepared by anyone expert in the field. The motion to conduct the survey did not set forth the size of the sample to be surveyed, and did not attempt to demonstrate that the survey method was free from bias or likely to produce accurate results.

The survey met none of the requirements of admissibility for survey evidence. The survey was not to be done to supply the facts upon which an expert witness would reasonably rely in basing an opinion. *See* Fed. R. Evid. 703. It was to be conducted for the truth of the assertions made by the interviewees, and would have been hearsay and inadmissible despite general relaxation of hearsay objections as to surveys. 1 Pt. 2 *Moore's Federal Practice,* Manual for Complex Litigation, Pt. I, § 271, at 119, 121-127. The survey also did not meet the admissibility requirement of scientific validity and trustworthiness. The party seeking admission into evidence of a survey has the burden of establishing that it was conducted in accordance with accepted principles of survey research; that the persons conducting the survey were recognized experts; that the data gathered was accurately reported; and that the sample design, the questionnaire and the interviewing were in accordance with generally accepted standards for such surveys. *Id.* at 126. From the face of appellants' motion and proposed survey, it was obvious that such standards were not met.[84] The survey

arriving at health care facilities from the chief law enforcement officer of the state saying he wanted to know what their practices were regarding consent to medical procedures for minors, and particularly regarding abortion procedures.

[84] *See* Handbook of Recommended Procedures for Trial of Protracted Cases, adopted by the Judicial Conference of the United States, 25 F.R.D. 351, 429 (1960), which specifies as a condition of admissibility that "the sample design and the interviews were conducted independently of the attorneys; and the interviewers, trained in this field, had no knowledge of the litigation or the purposes for which the survey was to be used." Appellants' proposed survey clearly failed to meet these requirements.

would have been inadmissible, *Bank of Utah* v. *Commercial Security Bank,* 369 F. 2d 19, 27-28 (10th Cir. 1966); *Sears Roebuck & Co.* v. *All States Life Ins. Co.,* 246 F. 2d 161, 171-172 (5th Cir.), *cert. denied,* 355 U.S. 894 (1957), and so hardly justified the dangers of delay inherent in appellants' motion. Fed. R. Evid. 403.

Appellants' bootstrap conclusion that the lack of survey evidence meant that the trial court based its decision on inadequate evidence is insubstantial. On the issue of consent to medical procedures for minors, the district court had before it the state court's description of the traditional and newly announced common law rules with respect to consent by or on behalf of mature and immature minors; the statutory requirements for consent to various medical procedures; and testimony of several physicians as to the consent practice at their health facilities. *E.g.,* 2 App. 12, 103, 125-126, 136, 162, 184. Had appellants wished to call additional physicians or hospital or clinic administrators, appellants were free to do so. The evidence before the court was relevant and reliable and afforded an adequate basis for decision.

B. *The District Court's Order Allocating Certain Costs Is Not a Ground for Reversal of the Judgment Below.*

The district court's order in *Baird III* awarding certain costs (1 App. 64) does not affect any of the intervenor-appellees, and, of course, has nothing to do with the substantive merits of this case. When it issued this order, the district court apparently was unaware of this Court's August 2, 1976 order dividing certain costs in *Bellotti I,*

since that order was issued somewhat over a month after the decision in *Bellotti I,* and since appellants themselves apparently overlooked it as late as the time of filing of their Jurisdictional Statement (which does not mention the August 2, 1976 order). Insofar as the district court's allocation of costs is inconsistent with this Court's August 2, 1976 order, appellants can and should move the district court under Fed. R. Civ. P. 60(b)(6) for modification of the cost award.

Appellants' argument in this section of their Brief contains a number of incorrect statements, however. The district court on two occasions has outlined in detail the changes over time in appellants' proffered interpretations of the statute, as well as the differences between what appellants represented to this Court and to the state court that the statute meant, and what the state court said it meant. See *Baird III* at 999-1000; *Baird II* at 855, 857.[85] Particularly egregious is appellants' claim that both this Court and the state court have "in large measure . . . found convincing" (Brief, 64) appellants' "position that the statute should be interpreted as a protective legislative act" (Brief, 64 n.37). Plainly, the statute is no mere protective legislative act, was not so construed by the state court, and should not be so construed by this Court.

Conclusion.

For the foregoing reasons, this Court should affirm the district court's judgment. In so ruling, this Court would not be signalling disapproval of legislation which, unlike the Massachusetts statute, encourages and prefers parental consultation for a minor but permits it to be bypassed

[85] This history belies appellants' claims that their "view of the statute's provisions and that of the Supreme Judicial Court . . . are so similar." Brief for the Appellants, 64.

without judicial involvement where in the minor's physicians' professional judgment it would be against her best interests.[86]

Respectfully submitted,

JOHN H. HENN,
SCOTT C. MORIEARTY,
SANDRA L. LYNCH,
FOLEY, HOAG & ELIOT,
10 Post Office Square,
Boston, Massachusetts 02109.
Attorneys for Intervenor-Appellees

Of Counsel:

LOYD M. STARRETT,
LAURA R. HANDMAN,
10 Post Office Square,
Boston, Massachusetts 02109.

JOHN REINSTEIN,
Civil Liberties Union
of Massachusetts,
68 Devonshire Street,
Boston, Massachusetts 02109.

[86] See Appendix A hereto.

Appendix A.

Md. Health Code Ann., Art. 43, §135(e), as added by 1977 Md. Laws ch. 961:

> (e) Notwithstanding any other provision of this section, no abortion shall be performed upon an unmarried minor female without prior notification of parent or guardian, unless the minor is living apart from her parent or guardian and a reasonable effort to notify them has been unsuccessful. A receipt that a registered or certified letter was mailed attached to a copy of the notice letter sent to such parent or guardian at his or her last known address shall be conclusive evidence of notice or attempted notice required by this subsection. Notification may be waived if the physision in his professional judgment, believes that notification might reasonably be expected to lead to abuse, either physically or emotionally, of the pregnant minor; however, there may not be criminal or civil liability on the part of a physician for his decision to waive this notification.

FOR ARGUMENT

Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS

v.

WILLIAM BAIRD, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Reply Brief for the Appellants

FRANCIS X. BELLOTTI
Attorney General
GARRICK F. COLE
MICHAEL B. MEYER
THOMAS R. KILEY
Assistant Attorneys General
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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Reply Brief for the Appellants

Introduction

Appellants Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts, and the Commonwealth's District Attorneys submit this reply brief to respond to several arguments contained in the briefs of appellees Baird, et al. (Baird), and Planned Parenthood League of Massachusetts, et al. (Planned Parenthood); to correct certain misstatements

found in appellees' briefs; and to object to attempts to enlarge the evidentiary record. These responses are not lengthy, but the Attorney General considers them sufficiently important to warrant the Court's attention prior to oral argument. The brief concludes with appellants' description of the constitutional glass through which they suggest the Court view the controversy now displayed before it.

Argument

I. APPELLEES INCORRECTLY ANALYZE THE STATUS OF THEIR CLAIMS CONCERNING IMMATURE MINORS AND INCORRECTLY STATE THE LAW GOVERNING A MINOR'S CONSENT TO THE PROVISION OF HEALTH CARE SERVICES IN MASSACHUSETTS.

A. *The Record Establishes that Defendants Raised the Immature Minor Issue Early in the District Court Proceedings and that Plaintiffs Waived Any Claims They Might Have Made on Behalf of Immature Minors.*

Appellants have previously argued that a facial attack on the statute is improper because only the claims of mature minors were before the District Court and because plaintiffs explicitly waived in writing any claims they might have asserted on behalf of immature minors. Brief for the Appellants at 51-52. Despite the record and despite unequivocal waiver, both sets of appellees attempt to interpret the proceedings in the District Court in a manner which would permit them to support the District Court's conclusions concerning immature minors. Such legerdemain has no place in constitutional adjudication.

Baird argues that appellants "failed to inquire about Plaintiffs' position on immature minors until the last day of the second trial . . .." Baird's brief at 39. Passing the observation that it is not a defendant's obligation to assist a plaintiff in conceptualizing and presenting his case, see 2 App. 472 (remarks of Julian, S.D.J.), this characterization of the record is inaccurate. The Attorney General first brought the immature minor issue to the District Court's attention, and, presumably, the plaintiffs' as well, in April of 1977, more than six months before the second trial began. See Defendants' Initial Statement of Disputed Material Facts, 1 App. 128-29. In the course of discovery, defendants frequently emphasized their interest in information concerning immature minors. See, e.g., Defendants' First Set of Requests for Admissions to Plaintiff Gerald Zupnick, 1 App. 154, 155, 165-68; Deposition of Carol C. Nadelson, 2 App. 489, 515-19. As a result, plaintiffs had a substantial opportunity to formulate their position concerning the claims of immature minors, and the written communications of plaintiffs' counsel with counsel for the defendants state what purports to be a well-established position fairly emphatically. 1 App. 417-18; 423-24; 426. How appellees can, on this record and in light of the assertion in their brief that they "have consistently approached [the statute] as including only mature minors within its scope . . .," Baird's brief at 38, also suggest that appellants "should be precluded by their own tardiness" from arguing this issue, *id.* at 39-40, eludes appellants' comprehension.

Planned Parenthood attempts to respond to the problem of immature minors in a more sophisticated, but equally unsatisfactory, manner. Planned Parenthood appears to argue that plaintiffs did not waive any claims in the District Court because counsel expressed an "intention" not to do so. Planned Parenthood's brief at 74, n. 71. Admittedly, at the conclusion of the second trial counsel did reserve his right to argue the

claims of immature minors. 2 App. 472, 475. But it is equally true, as just discussed, that counsel subsequently *did* expressly waive these claims. Planned Parenthood's footnote in its brief on this point, at 74, n. 71, by omitting reference to counsel's subsequent and dispositive actions, is simply misleading.[1]

In sum, no immature minors were actually before the District Court, and no person before the court properly asserted claims or adduced evidence on their behalf (with the possible exception of the dual consent issue). Moreover, to whatever limited extent immature minors were represented before the District Court, plaintiffs' counsel explicitly waived their claims. 1 App. 426. As a result, this Court should conclude that the District Court erred in sustaining plaintiffs' facial attack.

B. *Appellees' Various Formulations of the Commonwealth's Statutory and Common Law Mature Minor Rules Are Inaccurate.*

Inexplicably, appellees disagree among themselves and with appellants over the ability of an unmarried minor, male or female, to consent to the provision of health care services in Massachusetts without parental consent. In the Attorney General's

[1] Planned Parenthood also argues that, because the District Court determined in *Baird III* that the interests of immature minors were within the scope of the class represented by Gerald Zupnick (Planned Parenthood's brief at 75; *Baird III* at 1001, n. 6), these interests were before the court for all purposes from the commencement of the action. But the District Court never authorized Zupnick to assume such a responsibility. Rather, in passing upon his standing and certifying him as a class representative, the court held merely that he had "standing to attack the statute as applied to all minors, at least insofar as it requires the consent of both parents. . . ." *Baird I* at 852. This limited and technical acceptance of Zupnick as a class representative should not be considered an adequate basis for concluding that all the claims of immature minors were before the court, particularly in light of plaintiffs' failure to include appropriate allegations in their amended complaint. See 2 App. 472 (remarks of Julian, S.D.J.).

view, the situation is neither confusing nor demanding of speculation: under Mass. Gen. Laws Ann. ch. 112, § 12F (West Supp. 1979), a child or adolescent may not give legally effective consent to, say, the performance of abdominal surgery, unless he or she falls within one of the statute's six explicit categories. Moreover, a minor not within § 12F's scope, i.e., most adolescents and children in the Commonwealth, may avoid the traditional common law requirement of obtaining parental *consent* (not "consultation," as Planned Parenthood suggests at page 67 of its brief) by invoking the Commonwealth's limited mature minor rule only if a provider's notification of the child's parents would not be in his or her best interests. The Supreme Judicial Court's "literal" statement of the law in this regard in *Attorney General* needs no speculative gloss, see Planned Parenthood's brief at 67,[2] and there is certainly no support in *Attorney General* for Baird's assertion that "[a] minor who is capable of giving informed consent to medical treatment may be treated without parental consent and

[2] Planned Parenthood suggests that its speculation and preference for a requirement that physicians merely consult with a minor's parents should be accepted because the Supreme Judicial Court's comments appear under the heading of "Parental Consultation as a Requirement." Brief at 67-68. This argument should be unconvincing for two reasons. First, the heading, as the court states early in its opinion, is derived from the District Court's phrasing of its certified questions. *Attorney General* at 101, 360 N.E. 2d at 292. Second, the court itself, in reviewing the history of mature minor rules at common law in other jurisdictions, notes that the purpose of such a rule is to relax "the harshness of the rigid [common law] requirement of parental *consent* . . . [emphasis supplied]." *Attorney General* at 108, 360 N.E. 2d at 295. Therefore, it is clear that the court was aware that, absent a mature minor rule, a physician is required to obtain parental *consent*, and not simply consult with parents, prior to providing health care services to a minor. *Attorney General* at 110, 360 N.E. 2d at 296. ("We have never held or implied on common law grounds that a physician may operate on a minor, where there is no emergency, without the *consent* of at least one parent. We have indicated that such an *unauthorized* operation constitutes an intentional tort . . . [emphasis supplied; citation omitted]").

without judicial interference, except when that medical treatment is abortion or sterilization." Baird's brief at 33.[3]

As the Supreme Judicial Court states in *Attorney General*, while a limited mature minor rule exists in Massachusetts, the Legislature has determined not to permit its application to several difficult decisions, including abortion, sterilization, and, presumably, the selection of methadone maintenance as therapy for drug addiction. *Attorney General* at 111, n. 9, 360 N.E. 2d at 296, n. 9; see Brief for the Appellants at 31-32 and n. 18. Appellees often argue that this decision imposes an unjustifiable burden, is discriminatory, unreasonable, and, apparently, thus unconstitutional. See, e.g., Planned Parenthood's brief at 20. Appellants urge the Court to reject such mechanical reasoning, reasoning which would virtually deprive the Commonwealth of its traditional ability to adjust the protection which its law affords its minor citizens as circumstances change over time. In preference to the imposition of such a restriction, the Attorney General proposes that the Court simply recognize that the scope of a mature minor rule, whether a creation of the legislature or the judiciary, ought to be within the constitutional authority of the state to determine and that, as long as it does so reasonably, its judgments should be permissible.[4]

[3] Baird's brief describes § 12F's provisions properly at pages 13 and 32, but then misstates them at pages 21 and 33. Similarly, the mature minor rule is stated incorrectly at pages 32 and 33.

[4] The conclusion should be the same under "heightened" scrutiny, if the Court believes such review appropriate, because promotion of sound decision making by children and adolescents faced with the abortion decision (or that of sterilization or methadone maintenance) is a sufficiently significant state interest to justify differential legislative judgment. *See Planned Parenthood* at 102 (Stevens, J., dissenting); *cf. Carey* at 693, n. 15 (plurality opinion citing portion of Justice Stevens's dissent in *Planned Parenthood* with approval); *Maher* at 480 (state may impose different requirements affecting abortion decision under welfare program since "[other] procedures do not involve the termination of a potential human life . . .").

II. Appellees Incorrectly Rely Upon Roe v. Wade and Carey v. Population Services International to Establish Their Position that a Minor's Right to Privacy Has the Same Constitutional Dimensions as That of an Adult.

Perhaps the principal doctrinal issue in this case is the scope of a minor's right of privacy. The issue presents logical difficulties because the usual consequence of a determination that a constitutional right is "fundamental" is that state statutes which affect it are subject to strict judicial scrutiny. However, while this Court has held both that the right of privacy is fundamental and that it extends to minors, it has never held that state statutes affecting a minor's right of privacy are subject to strict scrutiny. In fact, various majorities of the Court have held precisely the opposite and approved state statutes which impinge upon a minor's fundamental right in a manner which would be impermissible were adults similarly affected. See Brief for the Appellants at 34, n. 19 (collecting examples). Decisional law thus suggests at least three analytical approaches: first, state statutes affecting the fundamental rights of minors are subject to ordinary judicial scrutiny; second, while subject to ordinary scrutiny, state statutes affecting the fundamental rights of minors may not work absolute prohibitions or impose government-mandated harm upon minors who seek to exercise their rights; and, third, a middle level of "heightened" review is appropriate. As appellants have argued previously, the statute which appellees challenge in this case is constitutional on its face under either the first or second set of standards. Brief for the Appellants at 17-33.[5]

[5] Apparently, Planned Parenthood was unable to understand the Attorney General's argument concerning the second alternative. Planned Parenthood's brief at 56, n. 56. The argument may well be incomprehensible if, as appellees do, one begs the very question to which it is directed.

The Attorney General has also argued that the statute is constitutional even if subjected to "heightened" judicial scrutiny as the Court has articulated this standard in similar cases. Appellees' arguments, on the other hand, seek to import criteria applicable to strict scrutiny analysis, or which only a plurality of the Court accepts, in order to justify their conclusion that the statute is unconstitutional. The Court should firmly reject these abuses of its cases.

Neither *Roe* v. *Wade*, 410 U.S. 113 (1973), nor *Doe* v. *Bolton*, 410 U.S. 179 (1973), involved an analysis of a state statute which, like the one at issue in this case, regulates physician conduct in order to encourage sound decision making by adolescents and children. In fact, the Court in *Roe* explicitly acknowledged that its discussion was not directed at such a question. *Roe* at 165, n. 67. Nevertheless, appellees cite both *Roe* and *Doe* as sources of constitutional standards directly applicable to this case. See, e.g., Baird's brief at 25, 31; Planned Parenthood's brief at 43, 55, 56, 62, 64, 65, 73, 77. Similarly, appellees' citations to *Carey* v. *Population Services International*, 431 U.S. 678 (1977), are improper. Despite the fact that appellants carefully point out in their brief that there *was no* opinion of the Court on the crucial question of the standard of judicial scrutiny which the Court should use to resolve the claims in that (and this) case, Brief for the Appellants at 24-26, appellees cite the plurality opinion in *Carey* as the opinion of the Court. E.g., Planned Parenthood's brief at 55 and 64; Baird's brief at 29-30. The Attorney General submits that, without such miscitations, appellees' arguments lose much of their force and do not establish that the Commonwealth's interests and the means it has chosen to advance them are constitutionally deficient. See Brief for the Appellants at 34-38. The Court should therefore conclude that the statute is constitutional.

III. The Statute's Provisions Are Amenable to Interpretation and Severance Without Violating the Principles of United States v. Raines.

Appellants have previously argued that the District Court should have either severed any unconstitutional provisions from the statute or enjoined its application to physicians in those situations in which its enforcement would transgress constitutional boundaries. Brief for the Appellants at 56-62. Appellees appear to agree that *United States* v. *Raines*, 362 U.S. 17 (1970), has severely limited *United States* v. *Reese*, 92 U.S. 214 (1875), but contend that the limited surviving exception which *Reese* provides to the *Raines* rule applies in this case. Planned Parenthood's brief at 81-85; Baird's brief at 41-44. Relying upon *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), appellees contend that the statute, if limited by enjoining its application to mature minors in the first trimester, would not give fair warning of the conduct which it forbids.

Papachristou was a case which dealt with vagrancy laws challenged on traditional void-for-vagueness grounds. *Papachristou* at 165-69. In contrast, appellees attack the statute in this case on the basis of its over-inclusiveness. See, e.g., Baird's brief at 15, 18, and 30 ("All parties admit that emotionally supportive parental involvement should be encouraged if at all possible. It is destructive, however, to the family unit for the Commonwealth to compel such involvement over the objection of physician and patient *in every case*. That is the objectionable quality of the statute in question . . . [emphasis supplied]"). Thus, assuming *arguendo* that the statute may not be constitutionally applied to physicians attending mature minors in the first trimester, an interpretation which limited its application to physicians in all other situations would still permit the statute to give intelligible warning to persons of

ordinary intelligence of the conduct which it forbids since it would apply to them on its face. Lack of intelligible warning to those subject to its requirements simply would not be a problem, and the Court should conclude that the strong principles of *Raines*, rather than the attenuated exception of *Reese*, control this case. See Brief for the Appellants at 59-62.[6]

Therefore, the District Court's order declaring the statute unconstitutional on its face and enjoining appellants from enforcing it in its entirety should be reversed.

IV. Appellees' Arguments Do Not Justify the District Court's Order Concerning Costs.

The District Court's decision and appellees' briefs are devoid of authority supporting the proposition that a lower federal court may alter an order of this Court under Rule 57

[6] Planned Parenthood's remark that this Court has always employed a facial (as opposed to an as applied) analysis in "abortion" cases, Planned Parenthood's brief at 77, is hardly an adequate response either to appellants' argument or to Justice Powell's recent observation concerning narrow, as applied injunctions in *Zablocki* v. *Redhail*, 434 U.S. 374, 401, n. 2 (1978):

> *Boddie* was an "as applied" challenge; it does not require invalidation of § 245.10 on its face. In ordinary circumstances [i.e., a statute which contains a severability clause and as to which the Legislature's intent is clear that it desires as much of the statute to be effective as is constitutionally permissible], the Court should merely require that Wisconsin permit those members of the appellee class to marry if they can demonstrate "the *bona fides* of [their] indigency," 401 U.S., at 382.

Of course, the statute in this case contains an unusually fine severability clause, and the Supreme Judicial Court has expressed the Legislature's intent that the courts construe the statute to preserve its provisions to the greatest extent possible.

concerning the division of costs on appeal. Indeed, Planned Parenthood virtually concedes that the District Court exceeded its authority, but suggests that the proper course for appellants to follow is not to appeal but rather to seek relief from judgment in the District Court under Fed. R. Civ. P. 60(b). Planned Parenthood bases its argument on an assumption, that the District Court was unaware of this Court's August 2, 1976, order concerning costs, which review of the record renders untenable.[7]

On June 7, 1977, after consulting with the Clerk of this Court, defendants filed a motion in the District Court seeking an order compelling the plaintiffs to comply with this Court's order of August 2, 1976, and reimburse defendants for the cost of their appeal.[8] Docket, June 7, 1977, 1 App. 37. On June 15, a unanimous District Court allowed defendants' motion. *Id.* While it seems that Planned Parenthood is unaware of the record on this issue, appellants submit that the District Court was not and that it entered its order fully aware of this Court's prior order under Rule 57. In such circumstances, a motion under Fed. R. Civ. P. 60(b) would be fruitless, and, in any event, appellants are entitled to seek this Court's judgment on appeal.

As an alternative basis for supporting the District Court's unprecedented order, appellees assert that appellants make "egregious" and "incorrect" statements in their brief concerning the Supreme Judicial Court's construction of the statute and have adopted arguments possessing "chameleon-like qualities." Planned Parenthood's brief at 90; Baird's brief at 44. These assertions add nothing to the District Court's ra-

[7] Planned Parenthood also assumes that appellants themselves were unaware of this order. Planned Parenthood's brief at 90. This assumption, untenable on its face, is also contradicted by the record.

[8] Plaintiffs forced defendants to file this motion by refusing to comply with the August 2, 1976, order voluntarily.

tionale and cannot, as a matter of law, justify its action.[9] They deserve a firm response, however, because they suggest that appellants have conducted their defense of the statute improperly both in the District Court and in this Court.

Constitutional adjudication is not a contest. It is not a game. And it is not, as is often the case with private litigation, merely an institutionalized method of resolving a dispute. Rather, and particularly in a case such as this, it is the means by which our society adjusts fundamental legal precepts to reflect evolving policies and values, and the abstention doctrine, as this Court re-emphasized in *Bellotti I*, is designed to aid it in performing this difficult task by precluding the consideration of constitutional challenges to state statutes when alternative interpretations are available which "would 'at least materially change the nature of the problem' that appellants claim is presented [citation omitted]." *Bellotti I* at 147. As a result of abstention and retrial, this Court now has before it a much narrower set of claims against the statute and a record much more complete than that which it considered in *Bellotti I*. Appellants submit that all parties to this litigation should be pleased that this controversy has been narrowed. Appellants also submit that the District Court unjustifiably failed to recognize the significant role which the Attorney General played in achieving this salutary result. See Brief for the Appellants at 64 and n. 37. The District Court had no authority to alter this Court's order of August 2, 1976, and appellants and the people of the Commonwealth do not deserve the punishment which it imposed. Therefore, its order purporting to alter this Court's order of August 2, 1976, should be reversed.

[9] In *Bellotti I* this Court disposed of complaints related to the invocation of the abstention doctrine, *Bellotti I* at 143, n. 10, and, of course, its order of August 2, 1976, was entered in light of its conclusions on this point.

V. This Court Should Not Consider Extra-Record Information Which Could have been Introduced as Evidence in the District Court or Which the District Court Explicitly Refused to Consider.

On April 13, 1977, in response to defendants' opposition and their Initial Statement of Disputed Material Facts, the District Court ruled that it would not proceed to consider this case on plaintiffs' motion for summary judgment and that, in the absence of stipulations, a trial would be necessary to compile an adequate record concerning several of the factual issues which defendants suggested were material. 1 App. 151-53. The District Court made its determination to try this case although most of the issues defendants brought to its attention involved "legislative" facts and although the practice of the federal courts in cases such as this has often been to consider "legislative" facts without subjecting them to the test of the trial process. *Compare Doe* v. *Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring and expressing concern over Court's use of legislative facts but concluding use did not exceed "the scope of judicial notice accepted in other contexts . . ."), *with Colautti* v. *Franklin*, U.S. , , nn. 14 & 15, 99 S. Ct. 675, 686, nn. 14 & 15 (1979) (Court relied upon testimony concerning legislative facts adduced at trial).[10] No party has appealed from this order of the District Court.

At the same time, the District Court also ruled that:

> [Disputed Facts] G and H [reproduced in the footnote],[11] particularly in light of the Supreme Judicial

[10] For a definition of "legislative" facts, see K. Davis, *Administrative Law Treatise*, § 15.03 (1958).

[11] Disputed Fact G is "In those cases in which a girl sought an abortion without parental consent, was required to consult her parents, and was re-

Court opinion, appear to the Court to raise questions of constitutionality as applied and not to present germane questions to this Court.

In other words, we rule now that we will conclusively assume for the purposes of our decision, utmost speed, diligence, and proper procedure and consideration, including protection of privacy by the Superior Court and an Appellate Court. This is a non-issue. . . .
1 App. 153.

Pursuant to this order, the District Court refused to consider evidence which Planned Parenthood proffered concerning the operation of the Massachusetts Superior Court system, and the evidentiary record contains no evidence on this question. No party has appealed from this order.

Despite these significant evidentiary rulings in the District Court, an organization of which appellee Planned Parenthood is an affiliate, Planned Parenthood Federation of America, Inc., seeks through an amicus brief [12] to enlarge the evidentiary record and have this Court consider information which, unlike that upon which the defendants relied in the District Court and rely upon in this Court on appeal, has not been subjected to the clarification and verification which the trial process provides. Moreover, Planned Parenthood Federation seeks to introduce this information without suggesting that it was unable to produce it as evidence in the District Court proceedings or that its affiliate, appellee Planned Parenthood, could not have done so on its behalf.[13] At the same time, appellee Planned Parenthood includes in its brief a chart, several statements of fact, and an argument concerning the very matters about which the District Court refused to take evidence and which it ruled a "non-issue." Planned Parenthood's brief at 47-52; 1 App. 153.

Appellants submit that the Court should not consider any of the extra-record information which either appellee Planned Parenthood or proposed amicus Planned Parenthood Federation has included in its brief. Doing so would have the effect of permitting appellees to insert in the record evidence which appellants have not had an opportunity to evaluate and to introduce new arguments, based upon disputed facts, which the District Court refused to consider and which, as a result, appellants have not thought necessary to prepare evidence to counter. At this point in these proceedings, and having failed to appeal the District Court's orders, appellee Planned Parenthood can hardly argue that fairness requires such results. On the other hand, as the deposition of Carol Nadelson, defendants' other discovery products, and the testimony adduced at trial demonstrate, opinions and findings of the type which Planned Parenthood Federation includes in its brief are controversial and often subject to qualification when tested upon cross-examination. To accept them without this safeguard, particularly when the District Court thought it unwise to do

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fused parental authorization, how quickly could she present her case to the Superior Court and obtain a decision . . . [footnote omitted]." 1 App. 132.

Disputed Fact H is "How quickly could a girl in the circumstances described in G obtain appellate review of an adverse Superior Court ruling . . . [footnote omitted]." *Id.*

[12] Appellants did not consent to the filing of this amicus brief precisely because appellee Planned Parenthood is an affiliate of Planned Parenthood Federation of America, Inc., and, presumably, is capable of making whatever proper arguments Planned Parenthood Federation has to offer.

[13] The nature of this evidence varies widely. Some of it is statistical; some of it consists of statements of opinion and belief published in the literature, both medical and legal; and some is simply collateral, i.e., used in an attempt to diminish the credibility or weight of evidence which defendants adduced at trial.

so, would be to run the risk of resting decision upon an unsure foundation.

For these reasons, then, the Court should ignore that portion of appellee Planned Parenthood's argument appearing at pages 47-52 of its brief and disregard all factual information contained in the amicus brief of Planned Parenthood Federation of America, Inc., should the Court grant its motion for leave to file.

Conclusion

> To conceal [substantive due process] inquiry invites mechanical or thoughtless application of misfocused doctrine. To bring it into the open forces a healthy and responsible recognition of the nature and purpose of the extreme power we wield when, in invalidating a state law in the name of the Constitution, we invalidate *pro tanto* the process of representative democracy in one of the sovereign States of the Union.
> *Zablocki* v. *Redhail*, 434 U.S. 374, 396 (1978) (Stewart, J., concurring in the judgment).

The evidence in this case establishes, and all parties agree, that "emotionally supportive parental involvement should be encouraged if at all possible . . ." to assist a pregnant adolescent or child with the difficult task of deciding whether to undergo abortion surgery. 2 App. 37-38; 104-05; 139; 390; 539-42; 579; Baird's brief at 15; Planned Parenthood's brief at 28, n. 22. The evidence also establishes that the statute is consistent with the best interests of the vast majority of pregnant adolescents and children whom physicians may attend. 2 App. 343-45; 541-42; see chart addendum to Brief for the

Appellants at 67; *see* Planned Parenthood's brief at 12 (accepting District Court's finding that "most parents probably are supportive . . ."). In addition, the evidence establishes that immature minors are incapable of consenting to the performance of abortion surgery, that a large number of abortions are performed on such children, and that, prior to a physician's performing surgery on an immature minor, "a valid consent by someone is required. . . ."[14] *Baird III* at 1001; 1 App. 157-59; 207-13; 515-16; Planned Parenthood's brief at 12, n. 11. Finally, the evidence establishes that the ethical problems which health care professionals face in providing services to pregnant adolescents and children are substantial and that agreeing to withhold information about pregnancy and abortion from a child's parents can create significant professional dilemmas. 2 App. 446-52.

At the same time, appellants acknowledge, as they have consistently, that the statute reflects "'legislative recognition of the unfortunate fact that parents are not always supportive of their pregnant daughters and may, the evidence suggests infrequently, refuse to consent to the performance of abortion surgery although the surgery is in their child's best interests, or mistreat her in other ways.'" *Baird III* at 1002. It is for this reason that the Massachusetts statute, unlike that which this Court considered in *Planned Parenthood*, includes a provision for judicial superintendence of the family decision making process.

Should this Court pull from the loom with a sweeping hand a cloth which the Commonwealth's Legislature and its Supreme Judicial Court have so carefully woven? Is it the function of substantive due process to tear apart a legislative

[14] Although Planned Parenthood recognizes this requirement in its brief, it is hard to understand who this "someone" might be and how room for such a fine judgment could be found in the Constitution were appellees' broad theories of a minor's right of privacy accepted.

judgment so delicate in its fabric and intricate in its detail? Appellants suggest not. As Justice Stewart observes, it is an "extreme power" which can work such alterations in the "process of representative democracy in one of the sovereign States of the Union . . .," and the Attorney General submits that this case does not warrant its use.

For the significant reasons previously discussed, appellants have argued that this Court should consider the statute constitutional on its face. In doing so, it might acknowledge the limits of substantive due process adjudication and point out that fine judgments concerning the exactly proper relationship between parents, their children, and the state are much more amenable to the legislative than the judicial hand. The eye of ordinary — or "heightened" — scrutiny simply cannot look as closely at or work as carefully with the intricate social threads which the Massachusetts Legislature has woven together in the statute as can the peoples' elected representatives.

Requiring recognition of the limits of substantive due process and facial attacks would not, however, entail acceptance of any constitutional infirmity which the Court may perceive in the statute's potential application to certain situations. For, as appellants suggested to the District Court, an established method, the "as applied" attack, exists to vindicate the constitutional rights of individuals or classes of persons impermissibly affected by a statute valid on its face. See, e.g., *Zablocki* v. *Redhail*, 434 U.S. 374, 401, n. 2 (1978) (Powell, J., concurring in the judgment) (making distinction and suggesting that as applied remedy should be provided in "ordinary circumstances," even in case involving fundamental right); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973) (rejecting facial challenge in First Amendment area); *Boddie* v. *Connecticut*, 401 U.S.

371 (1971) (an as applied attack on behalf of indigents). "Extreme power," as any other, benefits from conservation.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General
GARRICK F. COLE
MICHAEL B. MEYER
THOMAS R. KILEY
Assistant Attorneys General
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108

Dated: February 22, 1979

MOTION FILED
DEC 13 1978

In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, et al.,

Appellants,

vs.

WILLIAM BAIRD, et al.,

Appellees.

AND

No. 78-330

JANE HUNERWADEL,

Appellant,

vs.

WILLIAM BAIRD, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION AND BRIEF, AMICI CURIAE OF AMERICANS UNITED FOR LIFE, INC. AND EUGENE F. DIAMOND, M.D. IN SUPPORT OF APPELLANTS FRANCIS X. BELLOTTI AND JANE HUNERWADEL

VICTOR G. ROSENBLUM
DENNIS J. HORAN
JOHN D. GORBY
THOMAS J. MARZEN
PATRICK A. TRUEMAN
230 North Michigan Ave., Suite 515
Chicago, Illinois 60601
312 263-5386
Attorneys for AMERICANS UNITED FOR LIFE, INC. and EUGENE F. DIAMOND, M.D.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

PURPOSE OF THIS MOTION

Garrick F. Cole, Assistant Attorney General of Massachusetts representing appellants Bellotti et al., Brian A. Riley representing appellant Hunerwadel, and John Henn representing appellee Planned Parenthood League of Massachusetts have given consent for the filing of this Amici Curiae brief. Joseph J. Balliro representing appellee William Baird did not respond to a letter from Amici requesting consent. Letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICI

Americans United For Life (AUL) is a national educational foundation organized to educate and promote better understanding of the humanity of the unborn and the value of human life, and to assure equal protection under law for all members of the human family regardless of age, health, or condition of dependency. The national office of Americans United For Life is located in Chicago, Illinois, and its membership includes approximately 20,000 persons located in every state of the union.

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ERMA CLARDY CRAVEN
Minneapolis, Minnnesota

PROF. EUGENE F. DIAMOND, M.D
Pediatrics
Loyola University, Chicago

PROF. ARTHUR J. DYCK
Population Ethics
Harvard University

JOHN F. HILLABRAND, M.D.
Toledo, Ohio

DENNIS J. HORAN, ESQ.
Chicago, Illinois

MILDRED F. JEFFERSON, M.D.
Boston, Massachusetts

EDWARD G. KILROY, M.D.
Cleveland, Ohio

PROF. C. EVERETT KOOP, M.D.
Pediatric Surgery
University of Pennsylvania

LORE MAIER
Toledo, Ohio

MARJORY MECKLENBURG
Minneapolis, Minnesota

KENNETH M. MITZNER, PH.D.
Los Angeles, California

PROF. JOHN T. NOONAN
Law
University of California

DR. JACOB A. O. PREUS, President
The Lutheran Church,
Missouri Synod

HERBERT RATNER, M.D.
Child & Family Quarterly
Oak Park, Illinois

PROF. VICTOR G. ROSENBLUM
Law - Political Science
Northwestern University

JOSEPH R. STANTON, M.D.
Boston, Massachusetts

PROF. GEORGE H. WILLIAMS
Divinity - Church History
Harvard University

PROF. WILL HERBERG
Philosophy and Culture
Drew University
1971 - 1977

PROF. DAVID W. LOUISELL
Law
University of California
1975 - 1977

Eugene F. Diamond, M.D. is the Intervening Defendant-Appellant in *Wynn* v. *Carey and Diamond*, No. 78-2248 *appeal docketed* (7 Cir., Sept. 29, 1978) in which the Illinois Abortion Parental Consent Act of 1977, Public Act 80-1139, Ill. Rev. Stat. ch 38, §81-51 et seq. (1977) is challenged. (See relevant portions in Appendix B) Dr. Diamond intervened as a parent of a minor daughter of childbearing age to protect his fundamental common law and constitutional rights as a parent.

In at least two respects the Illinois Act is similar to the Massachusetts Act before this Court: 1) notice to the parents of a minor daughter seeking an abortion is required in all instances; 2) a legislative standard is established for balancing on a case by case basis the fundamental rights of the parents with the fundamental rights of the minor seeking an abortion in the event of a conflict concerning the making and effectuation of the decision. The Illinois standard is somewhat different than the Massachusetts standard because it is based on the competence of the minor, allowing a minor to obtain consent by order of a judge after a finding that the pregnant minor "fully understands the consequences of an abortion to her and to her unborn child." The Massachusetts Standard is based on "best interest" of the minor thereby allowing a court order "for good cause shown." Many of the issues raised in the Illinois Act are thus before this Court in this case challenging the Massachusetts Act.

Dr. Diamond seeks resolution of this case in a way that will not adversely affect his fundamental parental rights which are protected in the challenge to the Illinois Abortion Parental Consent Act of 1977.

This brief Amici Curiae is filed in support of Appellants Bellotti et al., and Appellant Hunerwadel, and also to present arguments to this Court that the Massachusetts Act challenged herein is constitutional.

These Amici respectfully request this Court to grant this Motion and allow the filing of this Brief served herewith.

Respectfully submitted,

VICTOR G. ROSENBLUM
DENNIS J. HORAN
JOHN D. GORBY
THOMAS J. MARZEN
PATRICK A. TRUEMAN
Attorneys for AMERICANS UNITED FOR LIFE, INC. and
EUGENE F. DIAMOND, M.D.
230 North Michigan Ave.
Suite 515
Chicago, Illinois 60601
312/263-5386

December 14, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, et al.,

Appellants,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF AMICI CURIAE

Introduction

Parents have fundamental common law and constitutional rights to educate and provide moral and other guidance to their minor children. Under certain circumstances

these rights may conflict with the fundamental abortional rights of a minor, particularly when the minor seeks an abortion against the wishes of her parents. The Massachusetts Act (See Appendix A) provides a workable and reasonable legislative standard whereby courts may resolve the conflict between parents and their minor children on a case by case basis by balancing the fundamental rights involved without permitting one right to totally subsume the other.

I. Parents Have Fundamental Rights to Educate and to Provide Moral and Other Guidance to Their Minor Children.

A) Common Law Rights of Parents

The common law rights of parents with regard to their minor children were extensive. 1 Blackstone, Commentaries on the Law of England, 446 *et seq.* (23rd ed., ed. J.J. Wendell, 1854, Harper & Bros., N.Y.); 2 Kent, Commentaries on American Law, 203 *et seq.* (12th ed., ed. O.W. Holmes, 1873, Little Brown & Co., Boston). Indeed, to specify the extent of parental prerogatories in American common law, Kent cites and explains the following case:

> In the case of Commonwealth v. Armstrong, in the session of the peace of Lycoming County, Pennsylvania, in 1842, Mr. Justice Lewis, the presiding judge, decided, after a learned examination of the subject that a minister of the gospel had no right, contrary to the express commands of the father, to receive an infant daughter, under the immediate guardianship of the father, from the church to which the father belonged, and in which the child was baptized and instructed and initiate it, by baptism, into another church of a different denomination. It was held to be the right and the duty of the father, not only to maintain his infant children, but to instruct their minds in moral and religious principles, and to regulate their consciences by a course of education and discipline. All interference with the parental power and duty, except by the courts of justice, when that power is abused, is injurious to domestic subordination, and to the public peace, morals and security. Parents, says a distinguished jurist on natural law, have the right by the law of nature to direct the actions of their children, as being a power necessary to their proper education. It is the will of God, therefore, that parents should have and exercise that power. Nay, he observes, parents have the right to direct their children to embrace the religion which they themselves approve. (Heineccius's Elem. Jur. Nat. et. Gentium, b. 2, c. 3, secs. 52, 55.)

2 Kent at 203 n. c.

Similarly, the marriage of a minor without parental consent was void at common law. 1 Blackstone, at 451.

Under the common law parents in most instances have the right not only to influence and persuade their children but also to guide and make actual decisions for their children.[1]

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[1] Several states have statutes which permit physicians to treat minors who have venereal disease or minors who are pregnant. These statutes have little, if any, bearing on the immediate issues before this Court for several reasons. They were enacted primarily to protect the physician against tort actions by parents or children for failure to obtain a valid consent for treatment. There does not appear to be any indication that these statutes were enacted to alter the legal relationship between parent and child as opposed to the legal relationship between child and physician or parent and physician. If the legislative intent had been to alter the parent-child relationship, serious constitutional questions would be raised. The compatibility of these statutes with the constitutional rights of parents has never been determined. Indeed, in a closely related case, *Doe* v. *Irwin*, 428 F. Supp. 1198 (1977), a federal district court held that the distribution by a state supported agency of contraceptives to minors without parental notice interferes with fundamental parental rights.

Thus the common law does not warrant the conclusion that the minor enjoys a right against the parent to procure a "secret abortion" or that the physician might proceed upon that basis.[2]

The Massachusetts Act, approached from the perspective of the parents' fundamental common law rights, limits the parents' common law right to actually make the abortion decision for the child since it permits the court to override the parents' decision for "good cause shown." This statute is analogous to the typical marriage statutes such as that in Illinois, Ill. Rev. Stat. ch. 40, §208 (1977), whereby the Court is empowered to provide consent for a minor to marry, thereby overriding the parents' refusal to consent to the marriage. To be emphasized is that, though these statutes limit the decision-making power of the parents, they do not limit the right of the parties to be notified of the child's intentions and desires and the corresponding right to attempt to influence and persuade their child according to their family moral and theological principles or according to the parents' notions of what serves the best interests of the child.

B) Fundamental Constitutional Rights of Parents

The common law right of parents to nurture and guide their children is protected from state action by the Federal

---

[2] Concerning medical treatment generally.

> "[i]n the absence of an emergency, an operation performed on a child without the consent of the parents or person standing in loco parentis is a legal wrong." 70 C.J.S. *Physicians and Surgeons* §48 (1951).

See also 61 Am. Jur. 2d *Physicians, Surgeons* 161 (1972); Restatement 2nd of Torts 59, Comment a, Illustration I (1965); 59 Am. Jur. 2d *Parent and Child* §15 (1972).

Constitution. The legislative history of the 14th Amendment to the United States Constitution reflects the concern of the drafters of the Amendment for the maintenance of the family structure for all members of the human family, including ex-slaves. In fact, whatever the origin of the minor's right to abortion, recognition of the parents' right to custody and guidance of their minor children is explicitly grounded in the intent of the Framers of the post-Civil War Amendments. The abolishionists saw one of the most repulsive features of the institution of slavery in the power of private parties to cause the slave's "authority and responsibility to rear his children [to be] obliterated. The members of his family might be torn from him and scattered." J. tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951).

The Framers of the post-Civil War Amendments would have regarded any suggestion that pregnant minor children have a constitutional right under the Fourteenth Amendment to conceal abortion from the parents as not only without foundation in law, but actively hostile to the spirit of the Amendments. When Senator Harlan of Iowa elaborated on the evils of slavery which the 13th Amendment[3] was intended to abolish, he noted that under slavery,

> [t]he conjugal relationship is abrogated. . . . Another incident is the abolition practically of parental relation, robbing the offspring of the care and attention

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[3] The intents of the Framers of the Thirteenth Amendment has a common origin with the Fourteenth. *See* Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 Mich. L. Rev. 1049 (1956); Graham, *The Early Antislavery Origins of the Fourteenth Amendment*, 1950 Wis. L. Rev. 479; Graham, *The Early Antislavery Background of the Fourteenth Amendment*, 1950 Wis. L. Rev. 610.

> of his parents, severing a relation which is universally cited as the emblem of the relation sustained by the Creator to the human family. And yet . . . this guardianship of the parent . . . must be abrogated to secure the perpetuity of slavery.

Congressional Globe, 38th Cong., 1st Session 1439 (1864).

Likewise, Senator Wilson of Massachusetts said that if the Amendment were adopted, "[t]hen the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law. . . ." *Id.* at 1324.

The Fourteenth Amendment thus was most clearly adopted to provide former slaves access to the judicial process[4] to vindicate commonly acknowledged rights. Among those rights were freedom from invasion of family privacy and the relational interests of parent to child. *See* Green, *Relational Interests,* 29 Ill. L. Rev. 460 (1934); Foster, *Relational Interests in the Family,* 1962 U. Ill. L. Forum 493; Pound, *Individual Interests in the Domestic Relations,* 14 Mich. L. Rev. 177 (1916).

This Honorable Court, in a series of cases dating to 1923, has recognized as fundamental these rights of parents under the 14th Amendment. In *Meyer* v. *Nebraska,* 262 U.S. 390 (1923) the Court held a Nebraska law making it a criminal offense to teach a foreign language to children before the ninth grade unconstitutional as a violation of the fundamental and "essential" rights of parents to control the education and upbringing of their children.

Similarly, *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), held the same parental rights precluded the State

[4] *See* Berger, Government by Judiciary, 169 et seq. (1977).

from forbidding parents to send their children to sectarian rather than public schools:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; *those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*

Pierce v. *Society of Sisters,* 268 U.S. at 534-535. (Emphasis added.)

In *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944) this Court said, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." More recently, relying upon *Meyer* and *Pierce,* this Court upheld the rights of Amish parents to disregard certain mandatory school attendance statutes:

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the *nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate* as an enduring American tradition.

Wisconsin v. *Yoder,* 406 U.S. 205, 235 (1972). (Emphasis added.)

Indeed, this Court has held that, under the 14th Amendment, even the putative father is entitled to a hearing before parental prerogatives are terminated, stating:

> The private interest here . . . undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949).

Stanley v. *Illinois*, 405 U.S. 645, 651 (1972). *Cf. Rothstein* v. *Lutheran Social Services*, 405 U.S. 1051 (1972); *Vanderlaan* v. *Vanderlaan*, 405 U.S. 1051 (1972); *Armstrong* v. *Manzo*, 380 U.S. 545 (1965).

Clearly, as Mr. Justice Stewart, concurring in *Ginsburg* v. *New York*, 390 U.S. 629 (1968), has stated, ". . . the legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility," *id.* at 639, and thereby affirm the "right of parents to deal with the morals of their children as they see fit." *Id.* As a recent decision requiring notice to parents before disbursements of contraceptives to minors by a state supported agency has held, the parental rights at stake

> . . . are protected under the First, Fifth, Ninth, and Fourteenth Amendments to the Constitution from the officious intermeddling of (even) well-intentioned public officials. . . . Therefore, absent a showing of compelling state interest, or a showing of superior rights in the minor child, the State may not totally exclude parents from the decision of their minor, unemancipated children as to whether *or not* to initiate sexual activity and consent to the risks of contraceptive devices and medications. A refusal to recognize the rights and the responsibilities of parents in such fundamental decisions of their children would present a frightening alternative.

> Nor do I read the recent decisions of the Supreme Court and other federal courts with regard to parental consent in the decisions of their children to have an abortion as allowing the State to totally exclude the parents of the child from such an important matter. (Emphasis Original).

Doe v. *Irwin*, 428 F.Supp. 1189, 1206-07 (1977).

The scope of the parents' fundamental constitutional rights is similar to their common law rights. Parents have the constitutional right not only to influence and persuade their children (a right which can be exercised in the abortional context only after notice of this child's pregnancy has been received) but also to guide and to make actual decisions for their children. This constitutional right is subject to limitation only on a case by case basis when it conflicts with other fundamental constitutional rights or to limitation by statute narrowly drawn to protect a compelling state interest.

Approached from the perspective of the parents' constitutional rights, the Massachusetts' statute limits the parents rights to decide for the child by empowering the court to override parental decisions on a case by case basis for "good cause shown."

The longstanding and fundamental privacy rights of the parents of minors—rights from which abortional privacy is itself derivative (see Section I, C below)—are at stake in this adjudication of the Massachusetts Act. Irreparable harm to these parental rights and interests, which the Massachusetts Act, on its face is designed to protect, would result if this Court upholds the lower court decision. Indeed, the judiciary is just as capable of vitiating constitutional rights as the legislature or executive. (See further discussion of this in Section II, *infra*.)

C) The Fundamental Common Law and Constitutional Rights of Parents Have Not Been Overruled, Modified, or Altered by Roe v. Wade

These fundamenal rights of parents were neither overruled, modified, changed nor altered by *Roe* v. *Wade*, 410 U.S. 113 (1973). Indeed, this Court in *Roe* found support for its conclusion that "the right of privacy includes the abortion decision" in the very parental rights cases discussed above. See *Roe* v. *Wade*, 410 U.S. at 152-53. See also Mr. Justice Stewart's concurring opinion in *Roe*, where (at 168 and 169) he supports his conclusion that a right to an abortion "is embraced within the personal liberty protected by the due process clause of the 14th Amendment" (at 170) with *Pierce* v. *Society of Sisters*, *Meyer* v. *Nebraska*, and *Prince* v. *Massachusetts*. Mr. Justice Douglas also supported his conclusion that there is a constitutionally protected right to an abortion with *Pierce* v. *Society of Sisters* and *Meyer* v. *Nebraska* (at 212 and 214).

The validity of *Pierce* and *Meyer* was reaffirmed in *Maher* v. *Roe*, 432 U.S. 464 (1977), which upheld a Connecticut restriction of state funds for abortions against a constitutional challenge, since this Court employed examples from *Meyer* and *Pierce* to reach its decision. And, furthermore the *Maher* Court stated that the rights recognized in *Meyer* and *Pierce* were "closely analogous" to that of *Roe*. *Maher* v. *Roe*, 432 U.S. at 476. The only conclusion, regarding parental rights to influence and guide their minor children, that may be gleaned from *Roe* v. *Wade* is that these parental rights are completely compatible with privacy rights.

D) Planned Parenthood v. Danforth Did Not Subordinate the Fundamental Common Law and Constitutional Rights of Parents to Any Abortional Rights of Pregnant Minor Children

As shown above, parental rights involve, at a bare minimum, the right to be informed of a minor child's pregnancy so that parents may attempt to influence and persuade the child according to the values and morals of the family and involve, at a maximum, the power to make the ultimate abortion decision in all instances. The parental consent provision in the Missouri statute ruled unconstitutional in *Danforth* provides parents with an absolute power to veto the abortion decision of the pregnant minor in all instances. From the perspective of the parents' common law and constitutional rights, the Missouri statute was completely constitutional. However, this Court held the statute violative of the pregnant minor's abortional freedom (the scope of which is discussed below in Section II) since the state of Missouri does not have the power to "impose a blanket provision" and could not give to a third party, *i.e.*, the parents, a power the State did not have. *Danforth* thus dealt only with the question of the parents power to make the abortion decision for their minor child in all instances. It did not deal with the question of the right of the parents to be notified of their daughter's pregnancy or of her intention to seek and have an abortion or of their right to attempt to influence and persuade their minor child, assuming *arguendo* she has the right of ultimate decision in a given case. Thus, the "notice and right to influence" aspect of parents' rights remain unaffected by *Danforth*.

Though *Danforth* dealt with the question of who has the authority to make the ultimate abortion decisions, the parents or the child, this Court did not resolve

the question in the favor of the parents or the minor child. Rather the Court said that "any independent interest the parent may have in the termination of the minor daughter's pregnancy is *no more weighty* than the right of privacy of the competent minor. . . ." *Planned Parenthood* v. *Danforth,* 428 U.S. at 75 (Emphasis added.) The Court emphasized that its holding did not suggest that "*every minor,* regardless of age or maturity, may give effective consent for termination of her pregnancy" *Id.* at 75. (Emphasis added.) The Court's language leads to the inescapable conclusion that the ultimate *decision* of whether a minor child may abort is not for the parents to make in all cases, but must be resolved on a case by case basis.

Only by requiring that a conflict between parents and child concerning the abortion decision be resolved on a case by case basis does this Court avoid permitting one fundamental right from subsuming the other. The right of privacy cannot be thought to be the "preferred right" or "pivotal right" under the constitutional scheme. Rather it is one of several fundamental rights which, when in conflict, with another fundamental right, must be balanced to prevent one right from destroying the other. The Massachusetts Act simply provides a legislative standard, *i.e.*, "for good cause shown," for resolving the conflict between the parents and the child in the individual case thus permitting both rights continued existence.[5]

In summary, the parents' rights to be notified of their minor daughter's pregnancy and intended abortion and their right to attempt to influence and persuade her remains totally unaffected by *Danforth.* Although *Danforth* does suggest limitations to the parents' decision-making powers in the abortional context, *Danforth* does not completely subordinate the parents' rights to decide to that of the child's. Rather, it suggests that both rights are equally fundamental, equally weighty. Thus, any conflict must be resolved by a rational standard. The Massachusetts Act provides such a standard.

[5] The Illinois Abortional Parental Consent Act provides a different type of standard for the resolution of a dispute on a case by case basis. The Illinois standard is "competence" of the minor to understand the nature of her decision to herself and her unborn child. *See* Appendix B.

II. Fundamental Abortional Rights Are Not Violated by the Massachusetts Act Which seeks to Balance Competing Fundamental Rights on a Case by Case Basis.

Although the exact scope of the fundamental right of privacy in the abortional context has not been clearly defined by this Court, there appears to be several possible constructions. The first and narrowest construction, is that abortional freedom is limited to the right to decide to have an abortion and to effectuate, without state interference, that decision. A second and somewhat broader construction is that the abortional right includes the right to decide and effectuate as well as the right to a secret abortion. Each construction and its effect on the right of parental notice and parental involvement in the decision will be discussed individually.

A. Narrow Construction of the Abortional Right.

1. Notice to the Parents.

Roe and its progeny demonstrate that the fundamental right to privacy includes the right to decide whether or not to abort and to effectuate that decision. *Roe* v. *Wade,* 410 U.S. at 153; *Planned Parenthood* v. *Danforth,* 428 U.S. at 60. It appears from these cases that the major reason for the abortion right is to be to free the woman of the burdens of an unwanted child and the right does not ap-

pear to extend further to the right to have a secret abortion. Thus the abortional right is a very limited one and if a minor may effectuate her decision her right is not limited by a requirement of notice to parents. In short, under this narrow construction notice provides no burden on abortional rights. Your amici urge this Court to accept this narrow construction.

In fact, *Danforth* upheld a state requirement of recordkeeping which allowed the state to receive notice of each abortion. *Planned Parenthood* v. *Danforth,* 428 U.S. at 79-81. If the state can require the fact that abortion has been performed on an identified woman to be relayed to an anonymous public official without impermissively burdening the abortional right, there is no doubt that the state possesses the power to require notice to parents of a minor child. Thus, assuming *arguendo* that parents do not even have rights in this context, the Massachusetts Act would be upheld under the *Danforth* analysis since the State, having a right of notice could award such right to the parents.

Mandatory notice of such information to the state may be "unpleasant" in some cases; it may cause some to "avoid or to postpone" the abortion; it may "reflect unfavorably on the character of the patient." *Whalen* v. *Roe,* 429 U.S. 589, 602 (1977). Nevertheless, it "does not automatically amount to an impermissible invasion of privacy." *Id.*

Under this construction of the right first recognized in *Roe,* parental notice, which is necessary in order to effectuate parental rights to guide and influence the child, does not unconstitutionally burden a minor's abortional right. Accordingly the rational relationship test is applicable and the Massachusetts Act, at least so far as it requires notice in every instance, is constitutional. *Maher* v. *Roe,* 432 U.S. 464 (1977).

2. Making and Effectuating the Decision.

With respect to the making and effectuation of the decision itself, if the parents alone are allowed to make the decision the minor will not be able to effectuate her decision in many instances. Assuming such a case the abortional rights of minors would be subsumed by the fundamental rights of parents. This presents the problem resolved in *Danforth.* On the other hand, if the minor would be entitled to decide in all instances, her abortional freedom would subsume parental rights to guide her. *Danforth* suggests that neither right is "more weighty" than the other. Thus, the solution to the problem is to balance the fundamental rights of parents and their minor children according to a reasonable and rational standard, thereby allowing both rights to exist in general and resolving individual cases according to the special circumstances of each case. The standard of the Massachusetts Act permits the court to make the determination on a case by case basis. The standard is "good cause shown." A determination of the standard for the balancing of rights in conflict is a proper legislative function. As this Court has said: "Legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas and Texas Ry. Co.* v. *May,* 194 U.S. 267, 270 (1904) (Holmes, J.). *Maher* v. *Roe,* 432 U.S. at 479-480.

Here because there is an actual limitation on either the parent's right to decide or the minor's right to decide, a burden will be necessarily imposed on one of the rights in conflict. However, rather than promoting its own interest of state at the expense of individual rights as is normally the case in Due Process litigation, the State is merely fulfilling its duty to protect and promote the fundamental rights of all its citizens. Thus a rational relationship test is

indicated. However, even if this Court would apply a more demanding test, your amici point out that the State has a compelling interest, if not duty, to protect the fundamental rights of its citizens and the Massachusetts Act is narrowly drawn to protect that interest. Thus the challenged Act withstands a more demanding test.

B. Broad Construction of the Abortional Right.

1. Notice to the Parents.

The alternative view of the scope of abortional right is that, in addition to the right to decide and effectuate, the woman also has a right to a secret abortion, *i.e.* an abortion without notice to the parents. Assuming *arguendo* that the right includes the right to a secret abortion, the question arises whether a minor's right is as broad. Requiring notice in all instances protects the nucleus of parental rights to guide and counsel and, because parental involvement may enable the minor to make a mature decision, notice protects the basis of the child's right to decide "whether or not" to terminate her pregnancy also.

Furthermore, if the court would allow the child to appear without notice to the parents and allow the abortion, the parents' rights involved in this conflict of rights are terminated without any opportunity to defend them, thereby depriving the parents of Due Process of Law. This Court has held that parents must be notified of an adjudicative hearing before a juvenile court in which the fundamental rights and interests of their minor child are at issue. *In Re Gault,* 387 U.S. 1 (1967). See also *Stanley* v. *Illinois,* 405 U.S. 645 (1972).

The lower court suggests that some parents may abuse their children but one cannot reasonably conclude that because of the remote possibility that some parents may abuse their children that every child is entitled to have an *ex parte* determination by the court without notification to the parents. The Court would, in essence, be determining the parents fitness without an opportunity for the parents to be heard. To take the word of just one party in a dispute and use that as a basis for terminating another's rights is contrary to the entire adversarial method of determining the truth and adjudicating rights in Anglo-American jurisprudence. The practical consequence of allowing this would be to terminate all parents' rights if a child alleges possible "abuse." Yet, as we have indicated in Section I B, parental rights still exist, and with careful balancing, the essence of both fundamental rights can continue in existence. This is done by requiring notice to the parents in all cases, thereby protecting their right to influence, and permitting the child, "for good cause shown," to make and effectuate her decision. Here again the State of Massachusetts is attempting to protect the fundamental rights of its citizens as opposed to promoting its own state interest against the individual. Thus, a rational relationship test is again indicated. Even here, since the State has an important, significant and compelling interest in protecting the fundamental rights of its citizens, the Massachusetts Act survives a more demanding strict scrutiny test.

Thus the only way that both rights may continue in existence is for the parents to be entitled to notice in all instances so they may attempt to persuade and influence their child and, if there is a conflict concerning the ultimate decision, to let the courts resolve it.

2. Making Effectuation of the Abortion Decision.

With respect to the decision aspect of this assumed broad right to an abortion the above analysis in II A 2 of the decision aspect of the narrow right to an abortion, is applicable: the parents have the right to participate in the decision under a standard which balances the fundamental rights involved.

Thus whether this Court takes a narrow view of the broader view of the right created in *Roe* v. *Wade*, with respect to the minor's abortional right, notice to the parents and an opportunity to participate in the decision aspect of the right is not unconstitutional.

CONCLUSION

The Massachusetts Act provides a workable and constitutionally permissible standard to balance the conflicting, fundamental constitutional rights of parents and minor children when a minor seeks an abortion against her parents' wishes.

Respectfully submitted,

VICTOR G. ROSENBLUM
DENNIS J. HORAN
JOHN D. GORBY
THOMAS J. MARZEN
PATRICK A. TRUEMAN
Attorneys for AMERICANS UNITED FOR LIFE, INC. and
EUGENE F. DIAMOND, M.D.
230 North Michigan Ave.
Suite 515
Chicago, Illinois 60601
312/263-5386

APPENDIX

APPENDIX A

Massachusetts General Laws c 112, §12S (1974):

> If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.
>
> Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve U.

APPENDIX B

Illinois Abortion Parental Consent Act of 1977 Illinois Revised Statutes ch. 38 §§ 81-51:

> No abortion shall be performed in this State if the woman is under 18 years of age and has not married except:
>
> (1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;
>
> (2) After the minor, 48 hours prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion; and
>
> (3) After the consent of her parents is secured and certified in writing.
>
> * * *
>
> If such consent is refused or cannot be obtained, consent may be obtained by order of a judge of the circuit court upon a finding, after such hearing as the judge deems necessary, that the pregnant minor fully understands the consequences of an abortion to her and her unborn child. Such a hearing will not require the appointment of a guardian for the minor. Notice of such hearing shall be sent to the parents of the minor at their last known address by registered or certified mail. The procedure shall be handled expeditiously.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, ET AL., *Appellants*

v.

WILLIAM BAIRD, ET AL., *Appellees*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AMICUS CURIAE

GEORGE E. REED
General Counsel
PATRICK F. GEARY
Assistant General Counsel

Attorneys for
United States Catholic Conference

1312 Massachusetts Avenue, N.W.
Washington, D.C. 20005
202/659-6690

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MOTION FOR LEAVE TO FILE BRIEF OF UNITED STATES CATHOLIC CONFERENCE AMICUS CURIAE

The United States Catholic Conference respectfully moves this Court for leave to file a brief *amicus curiae* in this case.

IDENTIFICATION AND INTEREST OF THE AMICUS

I.

Identification of the Amicus

The United States Catholic Conference is a non-profit corporation and an agency through which the Catholic Bishops of the United States collaborate with other members of the Church—priests, religious and laity—in areas where voluntary collective action on an interdiocesan and national basis can benefit the Church and society.

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

II.

Interest of the Amicus in This Case

This case affects relationships fundamental to our society. It is the conviction of this *amicus* that the Court can only be well served in matters of such wide import when it has assistance from all quarters. Thus, it is a spirit of service which prompts this *amicus* to make this submission.

GEORGE E. REED
General Counsel
PATRICK F. GEARY
Assistant General Counsel

Attorneys for
United States Catholic Conference

1312 Massachusetts Avenue, N.W.
Washington, D.C. 20005
202/659-6690

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BRIEF OF UNITED STATES CATHOLIC CONFERENCE AMICUS CURIAE

ARGUMENT

The question before this court is not whether Massachusetts may constitutionally require a parental consultation prior to the abortion of an unmarried minor but whether Massachusetts can constitutionally avoid doing so. A parent has a long-recognized constitutional right to nurture, education and guide his child. It is the view of this *amicus* that the state is without constitutional authority to ignore these fundamental rights. While it is true that this Court has held, in *Planned Parenthood* v. *Danforth,* that a parent does not have the right to control the abortion decision of an unmarried minor, it did not hold that a parent has no right to participate in such a decision. The same

right of privacy which is said to ground the practice of abortion also guarantees the right of a parent to counsel an unmarried minor.

There is, we submit, a great wisdom in requiring the state to respect the independent dynamism of the family. The family is essentially a biosocial institution whose existence comes about through the workings of human reproduction. It remains in existence because of physical and psychological interdependence among family members. These qualities, of course, are not related to any political or constitutional system and may be said to "pre-exist" such systems.

Moreover, people are not legal abstractions. Their lives are not a cold balancing of options. The irrational and emotional are just as much a part of human life as the rational. Family members may indeed fail to resolve their disputes according to abstract "justice"—yet the solutions at which they arrive may in fact ultimately work. Interpersonal relations are just that—relations between persons; and persons have emotional and psychological needs which cannot be articulated, let alone resolved, by the legal process.

Historically, the need for familial independence has won recognition under our legal system. The Supreme Court has repeatedly found that government has a constitutional duty to allow the family to make certain decisions free from government interference. In *Meyer* v. *Nebraska* (1923),[1] the court held that government could not prohibit a family from obtaining foreign language instruction for its children. In *Pierce* v.

[1] Meyer v. Nebraska, 262 U.S. 390 (1923), n. 15.

Society of Sisters[2] (1925), it held that Oregon could not completely eliminate the right of parents to obtain a private education for their children. In *Griswold* v. *Connecticut*[3] (1965), the Court held that government could not prohibit the use of contraceptives by unmarried couples and struck down a state law which attempted such a prohibition.

The court has continued to act to protect the institutional integrity of the family. In *Wisconsin* v. *Yoder*[4] (1972), the Supreme Court held that Wisconsin could not compel parents of Amish children to send their children to school beyond the eighth grade.

> "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."

In *Moore* v. *Cleveland*[5] (1977), the court struck down a zoning ordinance in East Cleveland which prohibited the cohabitation of a grandmother with her grandchildren in a single family residential area.

> "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."

[2] Pierce v. Society of Sisters, 268 U.S. 510 (1925), n. 16.

[3] Griswold v. Connecticut, 381 U.S. 479 (1965).

[4] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[5] Moore v. East Cleveland, 97 S. Ct. 1932 (1977).

Moreover, decisions such as *Meyer* v. *Nebraska, Pierce* v. *Society of Sisters, Wisconsin* v. *Yoder, Griswold* v. *Connecticut, Loving* v. *Virginia,*[6] *Skinner* v. *Oklahoma*[7] and *Boddie* v. *Connecticut*[8] accept, as a premise, the view that the family is something more than the sum of its aggregate members, an organic view. Within this tradition, the cases of *Pierce* v. *Society of Sisters, Meyer* v. *Nebraska* and *Wisconsin* v. *Yoder* not only confirm the Court's recognition of the organic view of the family but also the state's need and, in fact, duty to give protection and support to the familial undertaking.

The significance of this view of the family is evident in the remarks of Justice McReynolds in *Pierce* v. *Society of Sisters.*

> "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The Court has traditionally treated marriage and family as being coeval. Recently this organic conception of the family has been manifested and expanded by *Stanley* v. *Illinois*[9] and *Moore* v. *East Cleveland.* These decisions are witness to the fact that the state's obligation to the family extends to *de facto* as well as *de jure* families.

It is of critical import to note that these cases dealt with rights to be exercised by the family *qua* family.

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[6] Loving v. Virginia, 388 U.S. 1 (1967) n. 18.

[7] Skinner v. Oklahoma, 316 U.S. 535 (1942), n. 19.

[8] Boddie v. Connecticut, 301 U.S. 371 (1971).

[9] Stanley v. Illinois, 405 U.S. 645 (1972).

They did *not* deal with the internal policy or decision-making process within the family. The decisions protect the integrity of the family as an institution while at the same time refraining from any involvement in the interpersonal side of family life. In *Meyer* v. *Nebraska,* for example, the court did not deal with the issue of who in the family has a right to decide whether a child shall receive foreign language instruction nor did it consider whether the child has the right to resist such training. Similarly, the court did not involve itself in questions of family decision-making in *Pierce* and *Griswold.*

Now, however, there is a line of cases in which the court *has* begun to enter the interpersonal side of family life—specifically, *Roe* v. *Wade*[10] and *Doe* v. *Bolton*[11] (1973), *Planned Parenthood* v. *Danforth*[12] and *Baird* v. *Bellotti* (1976).[13] It has sought to align these cases with *Meyer, Pierce* and *Griswold* by virtue of the "privacy" doctrine. However, the privacy at issue in those earlier cases was essentially a familial right. By contrast, the right of privacy emphasized by the abortion cases and their successors is essentially an individualistic right. The cases in the *Meyer/Pierce* line protect the family from government interference but do not seek to determine the *locus* of decision-making in the family. The abortion cases and their progeny establish individual, not familial rights. Furthermore, in *Planned Parenthood* and *Baird* v. *Bel-*

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[10] Roe v. Wade, 410 U.S. 113 (1973).

[11] Doe v. Bolton, 410 U.S. 179 (1973).

[12] Planned Parenthood v. Danforth, 420 U.S. 918 (1975).

[13] Baird v. Bellotti, 428 U.S. 132 (1976).

lotti, the court seeks to involve the government in the decision-making process within the family.

The court's new view of privacy as an individual rather than a familial right took shape in a line of *obiter dicta* beginning with remarks by Justice Brennan in his opinion in *Eisenstadt* v. *Baird* [14] (1972). He described marriage as an association of individuals.

> "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child . . . the marital couple is not an independent entity with a mind and heart of its own. (Emphasis in original.)

Prior to this time the court had repeatedly recognized marriage as an institution which was made up of individuals but which took on a legal significance of its own. Since then it has increasingly favored a highly individualistic view. In *Roe* v. *Wade* the court found that the decision whether to bear or abort belonged to the woman *alone:* it was an individual decision, not a familial one.

Thus, these recent decisions of the Court have had the effect of politicizing the family. Rather than insuring an area of privacy, the court's decisions in cases beginning with *Eisenstadt* v. *Baird* have had the net effect of bringing government into disputes previously reserved for nonpolitical resolution.

Such a role can hardly be described as neutral, nor can it be said to protect the zone of private interest

[14] Eisenstadt v. Baird, 405 U.S. 438 (1972).

with which the court was concerned in *Meyer, Pierce* and *Griswold.* Rather, the "privacy" envisaged in the abortion cases actually signals government's entry into the interpersonal side of the family structure. The full, paradoxical import of these decisions is to suggest that family decisions about reproductive matters are ultimately social decisions, and that the way such decisions are reached is a matter for social and judicial determination.

CONCLUSION

Under traditional analysis of the right of privacy the statute before this Court would be treated as a codification of the pre-existing and constitutionally protected right of a parent to instruct and counsel an unmarried minor. Moreover, such an analysis would find that the state is without constitutional authority to abrogate such rights in the absence of compelling justification. It is the view of this amicus that a proper adjudication of the instant case would recognize that the statute is not only permissible but also constitutionally mandated by the familial right of privacy.

Respectfully submitted,

GEORGE E. REED
General Counsel
PATRICK F. GEARY
Assistant General Counsel

Attorneys for
United States Catholic Conference

1312 Massachusetts Avenue, N.W.
Washington, D.C. 20005
202/659-6690

amicus brief

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In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS

v.

WILLIAM BAIRD, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE LUTHERAN CHURCH (MISSOURI SYNOD), THE MICHIGAN DISTRICT, CHRISTIAN REFORMED CHURCH IN NORTH AMERICA, AND THE CHURCH OF JESUS CHRIST OF THE LATTER DAY SAINTS, IN SUPPORT OF APPELLANTS FRANCIS X. BELLOTI, *ET AL.*

Of Counsel:
ROBERT A. DESTRO
ROBERT M. ANDERSEN
Catholic League for Religious
and Civil Rights
1100 West Wells, Suite 501
Milwaukee, Wisconsin 53233
Phone: (414) 289-0170

STUART D. HUBBELL
Eighth at Boardman Avenue
Traverse City, Michigan 49684
Phone: (616) 947-9090
Attorney for *Amici Curiae*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION FOR LEAVE TO
FILE BRIEF AMICUS CURIAE

Four organizations, the Catholic League for Religious and Civil Rights, the Lutheran Church (Missouri Synod), the Michigan District, Christian Reformed Church in North America, and the Church of Jesus Christ of the Latter Day Saints, hereby respectfully move this Court for leave to file a joint brief *amicus curiae* in this case in support of Appellants Francis X. Bellotti, *et al.* The consent of attorneys for Appellant, Appellant/Inter-

venors and Appellee/Intervenors has been obtained. Attorney for Appellees has failed to respond to our request for consent.

The interest of *amici* in this case is twofold. First, each *amicus* is an organization concerned with parental rights and the care, custody, nurture, and education of children. This case raises important issues of a state's right to require parental notification and consultation before abortion surgery may be performed on certain minors. *See* Jurisdiction Statement of Appellants Francis X. Belloti *et al* . at 5-6.

The *amici* have extensive experience in the areas of education, domestic relations, parental rights, and parent/child relationships. *Amicus* Catholic League for Religious and Civil Rights, for example, is a tax-exempt organization involved in many legal cases respecting constitutional and civil rights of parents. *Amici* Michigan District, Christian Reformed Church in North America and the Lutheran Church (Missouri Synod) have participated as *amici* in other parental rights cases. Thus, in the instant case, *amici* would support the challenged legislation from the perspective of parents of minor children seeking abortion surgery. The various governmental appellants will approach the issues from a different perspective. In their official capacity as counsel for various governmental entities, appellants will exercise their constitutional duty to uphold and defend a state statute which is claimed to be constitutionally valid. It is the contention of *amici* that their participation in the instant case is necessary for the full and adequate exposition of the parental rights issues in the case.

Secondly, some of your *amici* are involved in cases which present parental rights issues either identical to or analogous to the issues in the instant case. The Lutheran Church-Missouri Synod and the Michigan District, Christian Reformed Church in North America are acting as *amici* in *Doe v. Irwin*, No. G–75–142 CA (W.D. Michigan) now pending before the United States Court of Appeals for the Sixth Circuit (No. 78–1056) and counsel for the Catholic League is attorney of record for a group of parent-intervenors in *Akron Center for Reproductive Health v. City of Akron, Ohio*, Case No. C78–155A (N.D. Ohio Pending). *Doe v. Irwin* involves the constitutionality of state action to exclude or prevent informing parents regarding their minor children's participation in contraceptive education and distribution programs. The *Akron Center* case involves an ordinance similar to the statute in the instant case. It requires parental consultation for all minors, except those emancipated, and consent for minors "of tender years" – defined as those minors under age fifteen. A decision in the instant case clearly has relevance to the disposition of other cases of vital concern to your *amici*.

For the foregoing reasons, *amici* move this Court for leave to file a brief *amicus curiae* in this case.

Respectfully submitted,

Stuart D. Hubbell
Attorneys for *Amici*
Catholic League for Religious and
Civil Rights, The Lutheran Church
(Missouri Synod), Michigan District,
Christian Reformed Church in North
America, and the Church of Jesus
Christ of the Latter Day Saints

December 14, 1978.

CERTIFICATE OF SERVICE

I, Stuart D. Hubbell, attorney for *Amici Curiae* in this case, being a member of the Bar of the Supreme Court of the United States, do hereby certify that I have caused a true and correct copy of the foregoing motion to be served upon Appellants, Appellant/Intervenors, Appellee/Intervenors, and Appellees, they being the parties of record by depositing copies of said motion in a United States Post Office mailbox, with first-class postage pre-paid addressed to: Francis X. Bellotti, Office of the Attorney General, the Commonwealth of Massachusetts, John W. McCormack State Office Building One Ashburton Place, Boston, Massachusetts 02108, and Garrick F. Cole, Office of the Attorney General, the Commonwealth of Massachusetts, John W. McCormack State Office Building, One Ashburton Place, Boston, Massachusetts 02108, attorneys for Appellants; Brian Riley, 40 Court Street, Boston, Massachusetts 02108, attorney for Appellant/Intervenor Jane Hunerwadel; John Henn, Foley, Hoag & Eliot, 10 Post Office Square, Boston, Massachusetts 02108, attorney for Appellee/Intervenor Planned Parenthood League of Massachusetts, *et al.*; and Joseph Balliro, 1 Center Plaza, Boston, Massachusetts 02108; attorney for Appellees, this 14th day of December 1978.

Stuart D. Hubbell
Attorney for *Amici Curiae*

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In the
Supreme Court of the United States

October Term, 1978

No. 78-329

FRANCIS X. BELLOTTI,
Attorney General of the
Commonwealth of Massachusetts, Et Al.,

Appellants

v.

WILLIAM BAIRD, et al.,

Appellees

On Appeal from the United States District Court
For the District of Massachusetts

BRIEF OF *AMICI CURAIE* CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE MICHIGAN DISTRICT LUTHERAN CHURCH (MISSOURI SYNOD), THE MICHIGAN DISTRICT, CHRISTIAN REFORMED CHURCH IN NORTH AMERICA IN SUPPORT OF APPELLANTS FRANCIS X.' BELLOTTI, *ET AL.*

Of Counsel:
ROBERT A. DESTRO
ROBERT M. ANDERSEN
Catholic League for Religious
and Civil Rights
1100 West Wells, Suite 501
Milwaukee, Wisconsin 53233
Phone: (414) 289-0170

STUART D. HUBBELL
Eighth at Boardman Avenue
Traverse City, Michigan 49684
Phone: (616) 947-9090
Attorney for *Amici Curiae*

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In the
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FRANCIS X. BELLOTTI,
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This brief is submitted on behalf of the above-named *amici curiae* pursuant to the January 15, 1979 order of this Court granting *amici* leave to file a joint brief as friends of this Court. Pursuant to United States Supreme Court Rules 40 (3) and 42 (5), *amici* will not present independent statements respecting:

(1) the legal opinions below; (2) the jurisdictional basis of this action; (3) the constitutional and statutory provisions involved; (4) the questions presented for review; and (5) a summary of the facts of this case. Rather, *amici* adopt and incorporate by reference the statements made respecting these matters as contained in the briefs of Appellants Francis X. Bellotti *et al.* and Defendant-Intervenor Jane Hunerwadel.

The interests of *amici* in this case, as organizations concerned with parental and family rights, are clearly expressed in the Motion for Leave to File Brief submitted by *amici* on December 15, 1978, and granted by this Court on January 15, 1979. To the extent *amici* view the issues raised by this case differently from the Appellants and Defendant-Intervenor Jane Hunerwadel, those views will be presented in the following modified statement of the case.

STATEMENT OF THE CASE

STATEMENT OF THE ISSUES PRESENTED

The precise issue in the instant case is the constitutionality of Massachusetts General Laws, Chapter 112, §12S, which, narrowly construed, grants notification and consultation rights to parents of certain minor children contemplating abortion surgery. *Amici* respectfully submit, however, that a more thorough statement of the issues, and a refocusing of this Court's consideration, is necessary for analytical clarity in this case.

It is important to recognize that the primary interests at stake in this case are familial. It is Appellees' contention, sustained by the District Court, that the Massachusetts notification/consultation provision is an unconstitutional burden on a minor's right to have an abortion. Nevertheless, neither Appellees nor the court below have demonstrated any countervailing interest which is served by keeping concerned parents uninformed regarding the counseling and medical care of their children in fundamental matters concerning sex, morals, procreation, and even judicial proceedings in which their children might become involved. This fundamental failure to address the consultative and custodial role of parents is indeed striking since that is the dominant issue in this case, as well as the issue which distinguishes it from ***Planned Parenthood of Central Missouri*** v. ***Danforth***, 428 U.S. 52 (1976).

In ***Danforth*** the issue was the constitutionality of a statute which required parental consent as an absolute prerequisite to the performance of abortion surgery on minors. Although the result in ***Danforth*** is not approved by your ***amici***, it will not be questioned here. Rather your ***amici*** will demonstrate that the majority of the ***Danforth*** court would support the notification/consultation rights involved herein.

More importantly, however, it is submitted that the analytical approach employed in ***Danforth*** unnecessarily confuses the judicial consideration of the Massachusetts law, and similar parental rights statutes, because it fails to recognize and balance all of the interests involved. Furthermore, the ***Danforth*** decision

fails to adequately recognize well-established parental and familial rights, which are subject at all times to governmental protection as well as statutory or judicial limitation when the need arises.

Thus, in the view of your *amici*, this case involves four distinct sets of rights: those of the pregnant minor, her parents, the state, and the abortion provider. To assume at the outset that the interests of the minor and the abortion provider must be balanced against those of the parents and the state, would, in the view of your *amici*, resolve the case before it begins. Rather, the main issue of the case is the appropriate balance between the well-settled rights of all entities involved, and the articulation of the role of the parties once that balance has been found.

SUMMARY OF ARGUMENT

Amici Curiae, the Michigan District, Christian Reformed Church in North America, the Michigan District Lutheran Church (Missouri Synod), and the Catholic League for Religious and Civil Rights support the arguments of Defendant-Appellant Bellotti (hereinafter "the state" or "Massachusetts") because General Laws Chapter 112, § 12S, as inserted by Statute 1974, Chapter 706, § 1, and renumbered by Statute 1977, Chapter 397 (hereinafter "the statute".) represents a laudable attempt on the part of the state to insure the integrity of the consultative process for minors contemplating abortion. In the view of your

amici it is this consultative process, its nature and content, and the role of the family unit in that process, which should be the focus of a reviewing court. That the process is educational is not open to serious question; and that most minors are particularly unsuited for making major life decisions is equally apparent. That plaintiff physicians stand to gain financially when a minor decides in favor of abortion is similarly clear.

The result of the decision below is to negate state power to assure that parents will have an opportunity to influence the decision-making processes of children who have already been "counseled" and supported by financially interested medical care providers who know virtually nothing of the minor's emotions, morals, religious background, or maturity. Pursuant to the District Court's order, a minor or abortion provider living in Massachusetts may effectuate a change in custody by the simple expedient of refusing to inform the minor child's parents. The court simply resolved any doubts concerning the need for parental input against the parents and the state.

In the brief which follows, your *amici* will develop what, they submit, is the correct analytical approach to the case at bar. First, this honorable Court should frankly recognize that there can be no exclusion of parents by the state or by third parties without violating fundamental familial interests; second, it should be recognized that the interests of minors are best served through a broadly based consultative process which includes parents; and third and most importantly, it should be recognized that, given the immaturity of most minors, the ques-

tion at bar is not an abstract notion of "minors' rights", but rather the question of *who* shall offer guidance. The choices are essentially three: the state, through its judges and social workers, the abortion provider, or the parents.

Amici Curiae respectfully submit that, in the absence of a showing of neglect or entry of a judicial order terminating the parents' custody, the constitutionally mandated first choice is the parents, and that by enacting Massachusetts General Laws Chapter 112, § 12S, the state has fulfilled not only its duty to protect the rights of parents, but also the best interests of pregnant minors. Finally, it will be demonstrated that, in any event, the parental notification/consultation rights involved in this case are compatible with the principles of the ***Danforth*** decision, and therefore should be sustained against constitutional attack.

ARGUMENT

I. PARENTS HAVE FUNDAMENTAL RIGHTS TO CONTROL, EDUCATE, NURTURE AND GUIDE THE ACTIONS OF THEIR MINOR CHILDREN WHICH ANTEDATE THE EXISTENCE OF THE STATE AND WHICH THE STATE IS CONSTITUTIONALLY EMPOWERED TO PROTECT.

A. The Rights of Parents And Their Children Are Well-Settled.

1. The Right of Family Integrity Is Fundamental.

Prior decisions of this Court establish that among the rights deemed "fundamental" is that of family integrity. ***Griswold v.***

Connecticut, 381 U.S. 479 (1965), ***Cleveland Board of Education v. LaFleur,*** 414 U.S. 632 (1974); ***Skinner v. Oklahoma,*** 316 U.S. 535 (1942); ***Prince v. Massachusetts,*** 321 U.S. 158 (1944); ***Pierce v. Society of Sisters,*** 268 U.S. 519 (1925); ***Meyer v. Nebraska,*** 262 U.S. 390 (1923). Until a compelling need for outside intervention is shown, neither the state, nor a third-party may interfere with intra-family choices or decisions. ***See, e.g., Alsager v. District Court of Polk County , Iowa,*** 406 F. Supp. 10 (S.D. Iowa 1975) ***aff'd*** 545 F.2d 1137 (8th Cir. 1976) (on substantive due process grounds); ***Paige v. Bing Construction Co.,*** 61 Mich. App. 480, 485-486, 233 N.W. 2d 46 (1975); ***New Hampshire v. Robert H.,*** 393 A. 2d 1397 (N.H. 1978).

In order to support the proposition that the Massachusetts parental consultation and consent provisions have a "chilling effect" on the rights of a minor, and that this Court should give its approval to a policy of parental exclusion, it must be assumed that, in the absence of evidence of individualized compelling need, the state has no power to "protect" a minor from her parents. In ***Wisconsin v. Yoder,*** 406 U.S. 205 (1972), the Supreme Court expressly rejected the idea that the State has a right to coerce or otherwise facilitate the defiance of parental authority by the minor because it disapproves of their beliefs and actions: [1]

---

[1] In the case at bar, the courts have apparently adopted a euphemism to describe the process. The parents are told by the courts, that they may consider only the child's interests. Such a determination cannot be realist-

> Recognition of the claim of the state. . .would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a state into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in ***Pierce v. Society of Sisters***, 268 U.S. 510 (1925).
>
> * * *
>
> Indeed it seems clear that if the State is emplowered, as ***parens patriae***, to "save" a child from himself or his. . . parents, . . .the State will in large measure influence, if not determine, the religious future of the child. 406 U.S. at 231, 232.

Clearly, one of the major reasons for the Appellees' objection to parental involvement is fear that their "supportive" counseling will be diluted or negated by the exercise of parental influence and authority. It is well-settled, however, that the state may not interfere with either the parents' or childrens' rights to reject viewpoints the state deems desireable. When the Appellees' interest is to disseminate an ideology or sell a service, no

---

ically made without consideration of all the factors which a family considers in making important health decisions. Surely these include age, effect on the family, health, financial ability, religious and moral considerations, and the more generalized effect the decision may have on the impressionable minor herself. ***See Doe v. Bolton*** 410 U.S. 179 (1973). The District Court specifically pointed to parental "anti-abortion" feelings as not being in a minor's best interest. ***Baird v. Bellotti***, 450 F. Supp. 997, 1001 (D. Mass. 1978). If this is not a federal attempt to insulate a child from governmentally disapproved notions of morality and conduct, it is difficult to conceive what is. Just as in ***Wisconsin v. Yoder, supra***, the conclusion is inescapable that the policies envisioned by the District Court may contravene the basic privacy and religious rights of the intervening parents, and may well infringe upon the minor's rights as well. ***See*** 406 U.S. at 218.

matter how acceptable it might be in the eyes of well-meaning social workers or judges, such an intent or interest cannot outweigh the parents' First Amendment right to avoid becoming unwitting nonparticipants in the counseling and treatment of their children, as stated by this Court in ***Wooley v. Maynard***, 430 U.S. 705 (1977):

> A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind". . .The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster. . .an idea they find morally objectionable. 430 U.S. at 714-15.

Even if ***amici*** give the District Court credit for its good intentions, and even though the governmental purpose to avoid illegal abortion is clearly a legitimate one, it is submitted that the governmental purpose may not be pursued by means that broadly stifle the parents' rights to influence the physical, religious, and moral upbringing of their children when the same end can be more narrowly achieved. ***Wooley v. Maynard, supra; Shelton v. Tucker***, 364 U.S. 489 (1960).

In ***State v. Whisner***, 47 Ohio St. 2d 181, 351 N.E. 2d 750 (1976), the Ohio Supreme Court considered, among other things, one of the minimum standards promulgated for Ohio elementary schools , which provided, in part, that "office records [containing "pertinent pupil information" such as level of

assignment, health, test scores, and confidential child study information] are not released to parents or guardians." The parents objected to the standard because they believed "it is very important for a parent to be apprised of everything occurring in school relating to his or her child or children." 47 Ohio St. 2d at 202. Striking down the regulation, the Ohio Court held:

> The minimum standards under attack herein effectively repose power in the state Department of Education to control the essential elements of non-public education in this state. The expert testimony received in this regard unequivocally demonstrates the absolute suffocation of independent thought and educational policy, and the effective retardation of religious policy, engendered by these minimum standards. . .47 Ohio St. 2d at 215.

Indeed, the federal government, recognizing the important role that parental consultation plays in the education of children, has enacted a comprehensive family educational rights statute which, among other things, grants parental access to minor students' educational records. 42 U.S.C. § 1232g (a) (1974). *See* Note, ***Federal Genesis of Comprehensive Protection of Student Educational Record Rights: The Family Educational Rights and Privacy Act of 1974***, 61 Iowa L. Rev. 74, 93-104 (1975).

The District Court employed the unsupported argument that the parental consultation and consent procedure established by the Massachusetts Legislature will not improve relationships within the family, but it was incumbent upon the Appellees to

demonstrate that the policies ***they*** desire do not, themselves, undermine the family structure. By approving surreptitous conduct in an already stressful family situation, the District Court's perception of sound constitutional policy, "rather than preventing or healing a disruption, would quite likely serve as the spark to a smoldering fire." ***Kilgrow v. Kilgrow***, 268 Ala. 475, 107 So. 2d 885, 889 (1958). ***See People*** ex rel ***Sisson v. Sisson***, 271 N.Y. 285, 2 N.E.2d 660 (1936) ***rev'g.*** 246 App. Div. 151, 285 N.Y.S. 41 (1936) (lower court had interfered with parent's unfettered rights to impart his religious beliefs to his child). It is absurd to argue, as the Appellees and the District Court, in effect, do, that failing to inform parents under such circumstances is in the family unit's best interests. The rights and potential consequences involved are too important, and the record too weak, to support such facile arguments.

2. The Judiciary May Not Mandate a Policy Which Raises Questions Directly, or by Negative Implication, Concerning the Content and Validity of Parental Religious or Moral Beliefs and Teachings.

In order to maintain their hold on certain minors involved with the clinics they operate, the Provider-Appellees deem it absolutely essential to exclude parental input. When faced with a free exercise claim that exclusion is violative of parental rights, and when the effect of the exclusionary judicial mandate is to mold the perception, attitudes, and activities of the minor children who consult abortion providers "it must appear either that the state does not deny the free exercise of religious belief

by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." ***Wisconsin v. Yoder, supra,*** 406 U.S. at 214.

If counseling prior to the decision regarding the pregnancy is to be at all worthwhile, it must discuss the attitudes of the minor toward abortion, contraception, and, if she does not want her parents to know of her pregnancy, her relationships with her parents. The District Court's opinion frankly recognizes this fact. One would have to be extremely naive to assume that the topic of parental opposition to abortion or premarital sex does not arise in such conversations. It is uncontroverted that the minors, counselors at the clinics, and the judges of the juvenile court would have to discuss the moral scruples of the parents and the family as well as the morality of the life style involved with teenage sexuality, in order to determine whether, under the District Court's order, parental "bypass" is necessary or advisable.

Counselors or judges must have a source from which they derive the answers to many of the dilemmas which arise in such sessions. It readily can be foreseen that discussions of this type demand that the participants analyze the attitudes of the parents. For purposes of illustration, it can be assumed that a minor might feel that her parents' opposition to abortion is based upon the notion that premarital sex is "wrong or sinful". Similarly, it may be assumed for purposes of illustration that an adolescent continually demands reasons for beliefs and activities.

Thus, even in a counseling session, the attitudes and beliefs of the ***parents*** and family come under strong scrutiny, by the minor, by the group (if group counseling is employed) and by the allegedly "non-judgmental" counselor. The situation is exacerbated when the purportedly "non-judgmental" counselor feels that abortion is a "liberating influence" for a pregnant minor, enabling her to continue her education or future plans without change. The District Court has mandated a policy which effectively insulates the abortion providers' "counseling" sessions in which the opinions, attitudes, morals, and ethical viewpoints of the parents are brought under scrutiny and has, in its view, created a "non-judgmental" and "supportive" atmosphere in which the minor's problems can be resolved. This expression of the Court's attitude strongly demonstrates the inappropriateness of the situation and the unconstitutional nature of the judicial exclusion of parents from the process. Thus, the threshold question is essentially whether the state may, in any fashion, seek to "analyze" or resolve intra-family disputes over matters of education or elective medical treatment having religious or moral components.

It has long been well-settled that the state is forbidden to intrude in the domain of doctrinal disputes over moral or religious matters. In ***Watson v. Jones***, 80 U.S. (13 Wall) 679(1872) the Court noted:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the

> laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. . .All who unite themselves to such a body [the general church] do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. 80 U.S. (13 Wall) at 728-729.

Since the Appellee's unsupported fear that the minors may not buy their services, but will instead seek illegal abortions, if the parents are informed rests upon a recognition that the parents may be opposed to abortion or a child's choice of clinic, the District Court's order is merely an attempt to avoid or settle an intra-family doctrinal dispute over matters of health, religion, or morality by "protecting" the minor from his or her own parents. This attitude was condemned in *Yoder*, *see* 406 U.S. at 232, and suffers from the same defect as the New York statute which sought to recognize the autonomy of North American Orthodox Churches from the Moscow-based general church struck down in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, (1952):

> By fiat it displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the

> benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment. ***Kedroff, supra***, 344 U.S. at 119.

In the context of family matters touching religious and moral teachings, the rationale of such cases is even more compelling. Thus, a court is forbidden even to be a "non-judgmental" arbitrator in matters between parents and their children where no neglect is shown; for to conclude, as the District Court has done on the basis of "well recognized" reasons that the parents' views are detrimental to its program is the essence of "judgment". In ***Moore v. East Cleveland***, 431 U.S. 494 (1977), this Court stated:

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. 431 U.S. at 503-04. (footnotes omitted).

Given this frank recognition of the inherent sanctity of the family, neither the Appellees nor the District Court have a compelling reason—and indeed it is impossible to conceive of one—why the abortion clinics or state supported counselors have any interest whatsoever in counseling pregnant minors regarding matters of religion and morality concerning which parents may desire to consult with and educate their children.

> The opinion [in ***Watson v. Jones***] radiates. . .a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. ***Kedroff v. St. Nicholas Cathedral, supra,*** 344 U.S. at 116.

Since neither the state nor federal government can prefer and teach any particular point of view regarding matters of religious teaching, ***Epperson v. Arkansas,*** 393 U.S. 97, 103-104 (1968), and since they are not empowered to resolve controversies between conflicting religious or moral doctrines, ***see e.g., Fowler v. Rhode Island,*** 345 U.S. 67, 69-70 (1953); ***cf., Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,*** 393 U.S. 440, 452 (1969) ("Thus, a civil court may no more review a church decision applying a state departure—from doctrine standard than it may apply that standard itself") they should similarly be enjoined from creating a policy where opinion, preferences, or views contrary to those of parents are expressed and "supported" in an inherently unfair setting in which there is no chance for rebuttal. The Ohio Supreme Court wisely noted that when the state attempts to be an "impartial arbiter" its position is fraught with danger:

> The state can have no religious opinions; and if it undertakes to enforce the teaching of such opinions, they must be the opinions of some natural person, or class of persons. If it embarks in this business, whose opinion shall it adopt? If it adopts the opinions of more than one man, or more than one class of men, to what extent may it group together conflicting opinions? [O]r may it group together the opinions of all? And where this conflict exists, how

> thorough will the teaching be? Will it be exhaustive and exact as it is in elementary literature and the sciences usually taught to children? [A]nd, if not, which of the doctrines or truths claimed by each will be blurred over and which taught in preference to those in conflict? ***State v. Whisner,*** 47 Ohio St. 2d 181, 207-08; 351 N.E. 2d 750 (1976) ***quoting Board of Education v. Minor,*** 23 Ohio St. 211, 249-51 (1872).

Had the framers of the Constitution foreseen government involvement in the affairs of the family, they clearly would have framed provisions akin to the First Amendment's protection of speech and religion because "the government is likely to corrupt the family whenever it attempts to improve it because it has no legitimate authority to set moral goals for individuals." Caplow, ***The Loco Parent: Federal Policy and Family Life,*** 1976 B.Y.U. L. Rev. 709, 713. ***Accord, Doe v. Irwin,*** 428 F. Supp. 1198 (W.D. Mich. 1977), ***vacated and remanded,*** 559 F.2d 1219 (6th Cir. 1977), ***aff'd on remand,*** 441 F. Supp. 1247 (W.D. Mich. 1977).

In ***Miami Herald Publishing Co. v. Tornillo,*** 418 U.S. 241 (1974) Mr. Justice White, concurring in the majority holding, stated:

> We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficient-sounding the purposes of controlling the press might be, we. . .remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press. 418 U.S. at 259.

Thus, in all areas covered by the First Amendment protective umbrella, this Court has been unwilling to allow governmental second-guessing or control of those who presumptively must control their own destinies: the press, the church, and the family. There is absolutely no reason for the rule to change here.

B. THE ORDER OF THE DISTRICT COURT APPROVING PARENTAL "BY-PASS" INFRINGES FUNDAMENTAL FAMILIAL RIGHTS.

1. Parental "Bypass" is, in Effect, a Transfer of Custody.

It is only when the integrity of the family unit is broken by divorce, neglect, or abuse that the state or a third-party may seek to terminate parental rights to the custody, care, and nurture of their children. *See, e.g.*, Mass. Gen. Laws Ann. chapter 119 § 24, Ohio Rev. Code chapter 2151. Your *amici* respectfully submit that, given the holding of the District Court and several assumptions which appear to underlie this Court's holding in ***Planned Parenthood of Central Missouri v. Danforth***, 428 U.S. 52 (1976), the main issues in the case at bar involve familial integrity, temporary child custody, and emancipation of minors. The case does not, as the District Court seemed to suggest, involve state-granted or created rights for parents to "interfere" with their children's wishes or a "veto" such as that involved in ***Danforth, supra***; rather, it involves young women in need of guidance and the state's attempt to create a structure whereby ***all*** parties interested in her decision have an opportunity to be heard. The Massachusetts statute recognizes the familial and emotional realities of the vast majority of pregnant teens; the opinion of the District Court does not:

> [A]s a moral structure, the American family is remarkably pluralistic. The family depends for its continuance, either abstractly as an institution or concretely as an individual family, on the maintenance of certain sentiments, obligations, and reciprocities that are neither automatic nor self-generating. The reasons why husband and wife cleave together, why children honor their parents, and why brothers do not take pay from each other are not derived from the state or its secular culture. There are moral sentiments underlying the interactions that constitute the family. Self-interest alone will not account for them, and the legal order cannot enforce them. Caplow, ***The Loco Parent: Federal Policy and Family Life***, 1976 B.Y.U. L. Rev. 709, at 712 (emphasis added in part) [hereinafter, Caplow].

Lest there be any misunderstanding of the point raised here, it is simply that the threshold question which not only the Courts below, but the parties themselves seemed to ignore is that, at bottom, the controversy between Appellees, the state, and the parents is over custody of the pregnant minor. The conclusion is inescapable, for it is well settled that a juvenile court does not even reach the question of "best interest" without a prior finding of parental unfitness.

> It is a serious matter for the long arm of the state to reach into a home and snatch a child from its mother. It is a power which a government dedicated to freedom for the individual should exercise with extreme care, and only where the evidence clearly establishes its necessity. . .

> Under our system of government children are not the property of the state to be reared only where and under such conditions as officials deem best.
>
> * * *
>
> The power of the juvenile court is not to adjudicate what is for the best interests of a child, but to adjudicate whether or not the child is neglected. In re ***Rose Child Dependancy Case***, 1947, 161 Pa. Super. 204, 208, 54 A.2d 297. In re ***Rinker***, 117 A.2d 780 (Pa. Super. 1955). ***Accord Petition of Kauch***, 358 Mass. 327, 264 N.E. 2d 371 (1970)

Since this Court's decision in ***Planned Parenthood of Central Missouri v. Danforth***, (1977) and, indeed, since ***Roe v. Wade***, 410 U.S. 113 (1973) the Court's treatment of pregnant minors and the development of constitutional principles in the area of "minors' rights" generally has lost sight of the basic principle, identified by Mr. Justice Frankfurter, concurring in ***May v. Anderson***, 345 U.S. 528 (1953):

> Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children. 345 U.S. at 536

The fact that a particular adolescent is faced with the wrenching problem of an unplanned pregnancy and consults with an abortion clinic or physician who is likely never to see her again to "solve" her dilemma does not automatically negate either the constitutionally protected rights of the parents to consult with and guide their children or the duty of the state to

protect that relationship from interference from outsiders. For this Court to uphold the District Court's decision is to radically alter—without compelling reason—the distribution of parental (i.e. custodial and consultative) power over children, placing it in the hands of physicians, social workers, and the state courts.

> It is hard to transact intellectual business in the coin of either the liberators or the child savers. Kid libbers have transmogrified the traditional conceptions of right and liberty. At the core of the civil rights movement and the women's movement has stood the idea that a person's legal autonomy should not be made dependent upon race or sex; it is straightforward and intelligible. By contrast the broad assertion that age is also irrelevant to legal autonomy inescapably collides with biological and economic reality. ***Because the young are necessarily dependent for some period after birth, the relevant question is often which should have the power to decide on behalf of the child.*** R.H. Mnookin, "Children's Rights: Legal and Ethical Dilemmas," ***The Transcript***, Summer 1978 at 53 (emphasis added).[2]

In the case at bar, parental bypass is the functional equivalent of allowing another adult (the "counsellor", judge, or physician) to act in the place of the parent when serious questions relating to their objectivity, qualifications to guide another's child, and proper role remain unresolved. The counsellor or

[2] Professor Mnookin's article originally appeared in ***The Pharos*** of Alpha Omega Alpha, Vol. 41, April, 1978 at 2. He identifies two groups of reformers: "Kiddie libbers" who espouse a "childrens' liberation" movement patterned after the civil rights movement and women's movements and "child savers" who "see salvation not through liberation but through expansion of a child's legal right to government intervention into the family." Mnookin, ***supra*** at 5. ***Amici*** submit that the District's Court order partakes of both theories without offering a coherent theory for either.

physician collects a fee, the amount of which may vary according to the decision made by the minor. Under the District Court's formulation the juvenile judge or case worker, on even more tenuous ground, becomes not only the arbiter but the parent, deciding not only the qualifications of the absent parent and the maturity of the child, but the "best interests" of the minor. In either situation the absence of the only persons who, in the absence of evidence to the contrary, can be presumed to know and care for the child – the parents – is notable. *Amici* submit that it is clearly unnecessary under the facts of this case.

The District Court, eschewing any rational discussion of the limitations on its own power to negate constitutionally protected interests, held that the state is powerless to assure that parents will be consulted on so serious a helath matter as abortion on the basis of several "recognized" reasons "why it would be to a minor's best interests for one or both of her parents to be kept in ignorance of her pregnancy." ***Baird v. Belloti, supra,*** 450 F. Supp. at 1001. Leaving aside, for the present, the question of just how a parent is to determine what interests are parental and which are allocable to the child *per se*, examination of the "recognized" reasons are instructive:

> Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. Defendents concede, and the evidence shows, that an appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or a continuance

> of the pregnancy as punishment. We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court. This would seem but a normal reaction of persons who hold strong anti-abortion convictions. ***Baird v. Belloti, supra,*** 450 F. Supp. at 1001.

Without impugning the good faith of the District Court judges voting to overturn the parental consultation requirement, *amici* submit that the entire approach of the Court below is itself constitutionally deficient in that it engenders exactly the same type of paternalism condemned by this court in ***Smith v. Organization of Foster Families, supra,*** 431 U.S. at 834. Not only does the District Court's opinion ostensibly permit judicial determination with regard to parental fitness to be based upon heresay evidence of alleged abusiveness, "unsupportiveness", or harm ***to the parents*** without affording notice and opportunity for the parents to be heard; but it also ignores the provisions of applicable Massachusetts laws. ***See Mass. Gen. Laws*** ch. 119 § 24 (allowing a neglect proceeding to be commenced by "***any*** person alleging . . . that said child is without necessary and proper physical . . . care.") (emphasis added). Even more bothersome is the gratuitous assumptions that an abortion is in the child's best interests whenever she desires one (regardless of age) and – incredibly – that a court can determine what is in a minor's "best interests" without parental input and a severance of the custodial right.

That the District Court could fail to see the parallel between parental bypass based on hearsay assertions, self-serving state-

ments and questionable presumptions regarding parties not before the court, and the practices condemned in ***Alsager v. District Court of Polk County, Iowa***, 406 F. Supp. 10 (S.D. Iowa 1975), ***aff'd*** 545 F. 2d 1137 (8th Cir. 1976) (per curiam) (on substantive grounds), and the recently decided ***New Hampshire v. Robert H.***, 393 A.2d 1387 (N.H. 1978) evidences a lack of reasoned decision-making. In both ***Alsager*** and ***Robert H.*** the parents were "bypassed" and their custody terminated on the basis of ***one*** visit by a social worker; the District Court below allows "bypass" by hearsay and an ***ex-parte*** order without even ***hearing*** from the parents.

The potential shortcomings of social work or child care professionals has been recognized by this Court in ***Smith v. Organization of Foster Families, supra,*** as well as by other courts. ***See e.g., New Hampshire v. Robert H., supra,*** 393 A.2d at 1389-1391; In re ***Rinker, supra,*** 117 A.2d at 783-784. But the District Court uncritically accepted the testimony of plaintiffs' "experts", perhaps equally--though unconsciously—biased against parental involvement in the abortion decision for fear parents may harbor anti-abortion sentiments. ***See Baird v. Bellotti,*** 450 F. Supp. at 1001.

2. Parental "Bypass", Whether By Legislative Act of Judicial Decree Is Unconstitutional In The Absence of a Compelling State Interest.

As early as 1922 the Utah Supreme Court held that a parent could not be deprived of the custody of his or her child—even

temporarily—without notice and an opportunity to be heard. ***Gitsch v. Wright***, 61 Utah 175, 211 P. 705 (1922).

> The question goes to the very foundation of judicial proceedings, without which the rights of litigants cannot be judicially determined. That every person has a right to his day in court and an opportunity to be heard before he can be deprived of a justiciable right is too elementary for discussion, much less to invoke the citation of authority.
>
> The right of a party to the custody of a child is just as sacred as the right of property. . .The plaintiff was entitled to retain. . .custody until deprived thereof by due process of law. By what has been said, there is no intention on the part of the court to in any manner impugn the motives and intentions of the honorable judge, or defendant in the case. It is manifestly clear that he was inspired by humane motives, believing that it was for the best interests of the child to summarily place it in the custody of its mother. But, however good his intentions, the court had no power to make the order, which is challenging in this proceeding. 211 P. at 706.

This Court followed the basic premise of *Gitsch* in ***May v. Anderson, supra,*** and held that ***in personam*** jurisdiction over a parent was a jurisdictional prerequisite to severance of the familial bond. The basic premise underlying this solicitude for the rights of parents to nurture, educate, and care for their children is "the importance of the familial relationship, to the individuals and to the society [which] stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life'

through the instruction of children, *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972), as well as from the fact of blood relationship." *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977). Thus, at a minimum, parents have constitutional rights to:

> (1) Physical possession of the child, which, in the case of a custodial parent includes the day-to-day care and companionship of the child.
>
> (2) The right to discipline the child, which includes the right to inculcate the parent's moral and ethical standards.
>
> * * *
>
> (7) The right to prevent an adoption of the child without the parent's consent. *L.A.M. v. Alaska*, 547 P.2d 827, 832-33 n.13 (1976).

Accord, Stanley v. Illinois, 405 U.S. 645 (1971); *Doe v. Irwin*, 428 F. Supp. 1198 (W.D. Mich. 1977), *vacated and remanded*, 559 F.2d 1219 (6th Cir.), *aff'd on remand*, 441 F. Supp. 1247(W.D. Mich. 1977); In re *Rinker*, 117 A.2d 780 (1955). *But cf., Quilloin v. Walcott*, 434 U.S. 246 (1977) (as to consent for adoption).

In the case at bar, the parental "bypass" mandate of the District Court not only severs the substantive rights of the parents without a hearing on the basis of *ex parte* allegations, it also prevents them from fulfilling their role as parents at a time when their daughters may need them most.

3. The Massachusetts Parental Notification/Consultation Requirements Are Clearly in Keeping with the Express Legislative Policy and Judicial Decisions of the Commonwealth of Massachusetts.

Massachusetts has legislatively declared its policy regarding the protection of children and the preservation of family life:

> It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the protection and care of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.
>
> The purpose of this chapter is to insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children. Mass. Gen. Laws Ann. ch. 119 § 1 (West)

The Supreme Judicial Court of Massachusetts has likewise recognized and asserted the Commonwealth's proper role:

> While the State defers to the parents with respect to most most decisions on family matters, it has an interest in insuring the existence of harmonious relations between family members, and between the family unit and the rest of of the public society. To protect this interest, the State may properly require that unemancipated children obey the reasonable and lawful commands of their parents, and

it may impose criminal penalties on the children if they persistently disobey such commands. The State is not powerless to prevent or control situations which threaten the proper functioning of a family unit as an important segment of the total society. It may properly extend the protection of its laws in aid of the head of a family unit whose reasonable and lawful commands are being disobeyed by children who are bound to obey them. The making of such laws is within the power of the Legislature "to make, ordain, and establish, all manner of wholesome and reasonable Orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; *** as *** [it] shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same." Part II, c.1 § 1, art. 4, of the Constitution of Massachusetts. ***Commonwealth v. Brasher***, 359 Mass. 550, 270 N.E. 2d. 389, 394, (1971).

The State's continuing concern for the "private realm" of the family, its strength, and integrity could hardly be manifested more clearly. The law-makers and the courts are understandably wary of any intrusion or threat to the stability of the family on the part of the state, its agents, and third parties.

As in other jurisdictions, interference is permitted ***only*** if the welfare and protection of the child are seriously threatened and strict safeguards have been created to assure that the rights and well-being of parents and children are preserved as much as possible. Thus, any person may petition the appropriate court for a custody determination, but first there must be a showing

> . . . that said child is without necessary and proper physical educational or moral care and discipline, or is growing up under conditions or circumstances damaging to a child's sound character development, or who lacks proper attention of parent, guardian with care and custody, or custodian, and whose parents or guardian are unwilling, incompetent or unavailable to provide such care, . . . Mass. Gen. Laws Ann. ch. 119, § 24. (West)

In the face of a proven charge of neglect, the rule is clear:

> Parents' rights must yield to the best interests and welfare of their children. Although parents are the natural guardians of their minor children, their obligation to their children is in the nature of a trust reposed in them subject to their correlative duty of care and protection. The parents' right to associate with their children may be terminated ***by their failure to discharge those obligations. Donnelly v. Donnelly***, ___Mass. App. Ct. ___, 344 N.E. 2d 195, 197 (1976) (emphasis added).

It is equally clear, however, that the presumption of the Commonwealth is that parents are entitled to the custody and care of their children, "unless the Probate Court finds the parents 'unfit to have such custody.' The burden of proving unfitness is upon those challenging the parents." ***Petition of Kauch***, 358 Mass. 327, 264 N.E. 2d 371, 373 (1970).

The Commonwealth's judicial authorities have wisely recognized that it is impossible for any inflexible standard to govern the "intricacies and subleties of the parent-child relationship" ***Guardianship of a Minor***, 1 Mass. App. Ct. 392, 298 N.E. 2d 890, 893 (1973). Yet general criteria have been formulated to determine whether parents are "unfit":

> In general, the word means unsuitable, incompetent, or not adapted for a particular use or service. As applied to the relation of rational parents to their child, the word usually although not necessarily imports something of

> moral delinquency. Violence of temper, indifference or vacillation of feeling toward the child, or inability or indisposition to control unparental traits of characters or conduct, might constitute unfitness. So, also, incapacity to appreciate and perform the obligations resting upon parents might render them unift, apart from the other moral defects . . . ***The unfitness of parents in this section of the statute must be determined with respect both to their own character, temperament, capacity, and conduct, and to the welfare of the child in connection with its age, environment and affections.*** *Richards v. Forrest*, 278 Mass. 547, 180 N.E. 508, 510-11 (1932) (emphasis added).

Thus, in any challenge to parental control, the best interests of the child must be carefully considered. As the Honorable Thomas D. Gill, a judge of the Juvenile Court for the State of Connecticut, noted:

> The neglect statutes are concerned with parental behavior not as behavior per se, but only and solely as it adversely affects the child in those areas of the child's life about which the statutes have expressed concern. Each child embodies his own unique combination of physical, psychological, and social components; no child has quite the same strengths or weaknesses as another or exactly the same relationship with his family. The parental failure which markedly damages one child might leave another quite untouched. This interaction between the child and his family is the essence of a neglect situation, the imponderable which defies statutory constraint. ***Guardianship of a Minor*** 1 Mass. App. Ct. 392, 298 N.E. 2d 890, 893 (1973) (citation omitted).

In the absence of evidence to the contrary, a parent is presumptively knowledgeable regarding the vast majority of the relevant factors noted above as they relate to his or her child,

and should be presumed to act in the best interests of that child. The mere fact that a parent would object to his or her child's activities, or would disagree with the child's unilateral decision to have an abortion does not automatically prove that the parent does not have the child's best interests at heart. This is the basis for the Massachusetts statutory requirements. Abortion is not always in the minor's best interests. Certainly, therefore, parents have both the right to know of the proposed abortion and the responsibility to assist their child in making such a decision. The Supreme Judicial Court's construction of the statute is an attempt to accommodate both the minors' right to seek an abortion and the rights of the parents to the care, custody, and control of their children.

The Legislature and judiciary of the state have chosen to reject the notion that the abortional rights of ***Roe v. Wade***, 410 U.S. 113 (1973) are absolute and exclusive. The theory that parental rights must ***always*** give way to the rights of their minor children has properly been dismissed as contrary to established public policy and the general well-being of the Massachusetts Commonwealth and the citizenry and it is not for the Federal Courts, under the guise of constitutional decision-making, to work so fundamental a change in the social order.

The state's course of accommodation wisely acknowledges that the rights and interests of parents and children are entwined and not easily severable. Thus, for good cause, the minor may seek a consent order from a judge if one or both of the minor's parents refuse to give consent for the abortion. This

provision of the Massachusetts statute is consistent with express legislative policy and controlling state court decisions, for the judge will then weigh the parents' decision within permissible limits and the best interests of the minor.

II. THE STATE MAY NOT FAVOR THE ALLEGED "PRIVACY" INTERESTS OF MINORS, IF ANY, TO THE EXCLUSION OF PARENTAL RIGHTS TO THE CARE, CUSTODY, AND NURTURE OF THEIR CHILDREN.

A. The Alleged Rights of Minors Cannot be Invoked As A Talisman by the State to Avoid Addressing the Interests At Stake In the Case At Bar.

It has now been settled conclusively that notwithstanding a right of access to non-prescriptive contraceptives free of state interference, *see e.g., Carey v. Population Services International,* 431 U.S. 678 (1977); *T_H__v. Jones,* 425 F. Supp. 873 (D. Utah 1975) (three judge court), *aff'd in part by order,* 425 U.S. 986 (1976), the right of access to constitutionally protected activity does not alone carry with it a claim on the public purse to fund the distribution of such services. *Maher v. Roe* 432 U.S. 464 (1977); *Poelker v. Doe,* 432 U.S. 519 (1977).

Although the right to tap the public purse is not at issue in the case at bar, it is important to recognize that although rights may be considered by the Supreme Court to be "fundamental", such a circumstance does not automatically bend all the normal rules which govern constitutional adjudication in cases where they are alleged to be at stake. In both *Maher* and *Poelker, supra,* this Court clearly recognized that a desire to have the exercise of one's constitutional rights funded at public expense raises serious constitutional concerns:

> [W]hen a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations. *Maher v. Roe,* 432 U.S. at 469-470.
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> * * *
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> The decision whether to expend state funds . . . is fraught with judgments of policy and value over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability, for this Court does not strike down state laws "because they may be unwise, improvident, or out of hamony with a particular school of thought." *Williamson v. Lee Optical Co.,* 438 U.S. 483, 488 (1955) (citation omitted). *Maher v. Roe, supra* at 479.

The importance of the foregoing language as a guide lies in its emphasis on the constitutional limitations on state action and judicial conduct. The fact the legal abortion is available to minors does not automatically negate the State's constitutional obligations to parents nor does it supercede the limitations imposed by the Constitution upon interference in internal familial relationships, especially those having moral or religious components.

Similarly, the allegation that there exists a right to "privacy" which may comprehend access to abortion by minors is not a talisman which can be invoked by the courts to negate the fundamental interests of parents. The same tactic was attempt-

ed, and rejected, in ***Maher*** and ***Poelker***, and the attempt to utilize a similar analysis in the District Court's opinion should be recognized for what it is and, accordingly, rejected.

The fact that a court may feel that there is a "need" for its decision and subsequent abortion services to be rendered in secret is determinative of neither the question of whether or not it may foreclose parental involvement, nor the entirely separate issue of whether or not the minor has any constitutional right to demand that the state exclude her parents from the decision-making process. A thorough analysis of both questions demonstrates that they are without merit.

> [T] here is a distinction between the ***needs*** of some minors for family planning materials and the ***rights*** of some minors to those materials. The . . . emphasis on preventing physical harms addresses the needs of some minors so endangered. However, the right, if any, of minors to those materials is based on capacity, of which need is not a function. Thus, the . . . reference to sexually active minors as those whose interest cannot be infringed is a legislative conclusion, since it responds to needs, rather than a judicial one, which would respond only to the rights involved. The right of privacy claimed here does not give occasion to consider the needs of minors in its calculation. ***T_H_ v. Jones***, 425 F. Supp. 873, 887-888, n.6 (D. Utah 1975) (3 judge court, emphasis by the Court.) (Anderson, J. dissenting).

Thus, this Court should be aware of the fact that the purported "need" which the District Court sought to establish is not ***the need to reduce illegal abortions***, see ***Baird v. Bellotti***, 450 F. Supp. 997, 1003 (D. Mass. 1978), or the alleged need of

minors to broad access to abortion and "supportive" counseling; rather, it is the purported "need" of the minor to avoid parental input in the quaternary relationship of physician-counselor-state-patient.[3]

B. THE RECORD IS DEVOID OF EVIDENCE THAT PARENTAL AND STATE INTERESTS ARE IN CONFLICT WITH EITHER THOSE OF MINOR CHILDREN OR THE APPELLEES REGARDING PROBLEMS CREATED BY OUT-OF-WEDLOCK PREGNANCY.

1. The Decision of the District Court Lacks Evidentiary Support.

Since a pregnant minor has no constitutional right to demand that the state provide free abortions, ***Maher v. Roe, supra, Poelker v. Doe, supra,*** she has no right to demand that the state prefer whatever interests she might raise in support of secrecy over the interests of her parents to the care, custody, and nurture of their child. In addition to the grave constitutional questions which arise when the State interferes in familial disputes, it is submitted that a minor has no judicially enforceable claim, federal or otherwise, to be free of the advice and consultation of her parents. ***See*** discussion ***infra*** Part III. A.

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[3] The District Court failed to appreciate the complexity of the relationships at stake here. The physician has only a tangential relationship to most abortion patients, seeing them only when problems arise or when the abortion is about to be performed. The Appellees have never demonstrated the need for minor to avoid consultation with their parents. It has only been able to allege that such contact might face the minor with an unpleasant situation—parental opposition to their desire to abort. This is not a proper governmental concern unless it constitutes medical neglect detrimental to the child's well-being. ***See*** Part I. B. ***supra.***

The Appellees have attempted to establish a system which, by judicial fiat, excludes parents from the minors' decision-making, but have demonstrated no compelling reason for so doing. Thus, the attempt is nothing more than a well-intentioned attempt to remake the family and the minor's moral and religious training in the image of those who see abortion as a panacea for the pregnant teenager. The Appellees, for reasons of their own, (which do not appear in the record), do not wish to include parents in the physician-state-counselor-minor relationship which the District Court has established in the hope of "saving" a minor from "unsupportive" or "anti-abortion" parental views.

> [A]t present, all three branches are busy recreating the American family in no particular image. Their efforts are complex to begin with and become more complex as they prove faulty and are repeatedly repaired and patched. At the heart of the government's inability to improve family arrangements is a fundamental lack of understanding of the nature of the family structure. Caplow, ***supra***, at 711.

The fundamental truth of Professor's Caplow's observation is underscored by the District Court's cavalier attitude towards parents and its outlook and response to the problem of premarital sex and abortion. Incredibly, and without support from from the record, the Court equates some parents' opposition to abortion as a total lack of concern about the problem of out-of-wedlock pregnancy. The Court concludes, without foundation, that parental consultation "will lead her to the

illegal abortionists that defendants rightly decry or to other dangerous activity." 450 F. Supp. at 1003

Given that the record contains no evidence that the Massachusetts statute will not function properly and drive minors to illegal abortionists[4], the animus the Appellees exhibit toward the arguments made by the intervenor and the State must rest upon something ***other than*** a proven detrimental effect of parental consultation and consent on a yet-to-be-proven-harmful program. It is submitted that Appellees' opposition rests on a fear (born of financial interest and, in some cases, intolerance) of the parents' legal, philosophical, religious, or health-related objections to the counseling conducted at the clinics or under the auspices of a juvenile court.

A thorough examination of the record will not point to any evidence whatsoever which would support an allegation that parents do not have the best interest of their minor children in mind. In fact, the only evidence about the allegedly detrimental effect of parental involvement is opinion testimony by the plaintiffs' experts that "doubted the efficacy of last minute,

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[4] The allegation that the statute will result in illegal abortions proves nothing. There is no evidence in the record proving the point other than speculation. In fact, there exists a substantial question regarding the definition of "illegal abortion" in this case. As long as the minor could find a doctor willing to ignore the Massachusetts statute, the abortion would otherwise be perfectly legal. The recent exposé of allegedly "safe" legal abortion clinics in Chicago presents the pregnant teen with a "Hobson's choice." ***See The Abortion Profiteers***, Chicago Sun-Times, Nov. 12–Dec. 3, 1978 (special reprint). The concern of the state and of the federal courts is ***only*** that the pregnant minor get the medical services she needs; they have no valid concern with the type of treatment chosen unless it can be shown that her health will be endangered and that the choice constitutes neglect.

state-compelled consultation." 450 F. Supp. 1003.

What the Appellees and the District Court failed to acknowledge, however, is that even families with "healthy" parent-child communications may face an unplanned pregnancy, and in situations where communications regarding premarital sex have not take place prior to the pregnancy, the parents may be totally unaware of or only dimly suspect, their child's sexual activity. In either situation the District Court's conclusion is highly condescending, for it fails to recognize that parents have a ***right*** to consult. It is not for the courts, or paid social workers, to judge the worth of a parent's input.

The difficulty becomes even more acute in cases where the minor's fear is that her parents will discern – from her pregnancy – that she is sexually active. Parental antagonism toward such activity, or their initial upset and frustration over what they may understandably perceive as a "failure" of their guidance, may ***not*** be equated with a showing of neglect or a default of parental duty. Likewise, neither the reaction of the parents toward the "counseling" the child receives at an abortion clinic, nor their antagonism toward abortion in general, is evidence of a lack of parental concern or support.[5] The difference may be over the ***method*** of how to deal with the pregnancy, not the reality. The comments of the New York Court of Appeals are instructive:

> The court cannot regulate by its processes the internal affairs of the home. Dispute between the parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the unbringing of children must be left to the conscience, patience and self-restraint of the father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental and physical conditions are so bad as to seriously effect the health

[5] In the context of the case at bar, the notion of parental "supportiveness" seems to be equated with approving the decision to abort. While it may be conceded that some parents would demand that their daughter abort, it is doubtful that a court would force her to over her objections. The Apellees' concern, however, is where the parents ***disapprove*** of abortion and attempt to persuade their daughter to carry the pregnancy to term. This is in Appellee's view, failing to be "supportive of a decision" reached in consultation with individuals, paid by the clinic, who are, essentially, parent-surrogates. The anomalous result is that parents are expected to be "supportive" of a decision in which they played no part, and of which they disapprove on pain of being excluded entirely from even knowing of the procedure. The danger of such inverted reasoning becomes even greater when some clinics pay their "counselors" to sell abortions and feel they must "corral" their patients. ***The Abortion Profiteers***, Chicago Sun-Times, Nov. 12-Dec. 3 (1978) (special reprint) at 3-4, 21, 33.

The reasons why a parent may disapprove of abortion and the reasons why a parent may counsel their daughter to avoid one may not be questioned or disapproved by either the state or federal courts:

> [A]t this date and time in the history of our nation it is crystal clear that neither the validity of what a person believes nor the reasons for so believing may be contested by an arm of the government [citation omitted] . . . The applicable test was enunciated in ***United States v. Seeger*** (1965) 380 U.S. 163, 185, in these words: ". . . that while the 'truth' of a belief is not open to question, there remains the significant question, whether it is 'truly held,'" ***State v. Whisner***, 47 Ohio St. 2d 181, 199, 351 N.E. 2d 750 (1976).

The District Court's conclusion that the parents' views were of doubtful efficacy to a pregnant teen is exactly the sort of unconstitutional intereference condemned in ***Wisconsin v. Yoder, supra, and Whisner***.

or morals of children, should the Courts be called on to act. ***People ex rel Sisson v. Sisson***, 271 N.Y. 285, 2 N.E. 2d 660, 661 (1936).

2. The District Court's Opinion is Inconsistent With Generally Accepted Concepts for the Protection of Immature Minors.

Historically, government has been extremely careful to avoid usurpation of parental authority and to encourage family values. Clearly, it is this desire to foster family values and to recognize parental authority which prompts states to enact statutes which set the minimum age for many potential activities of minors.[6]

Any move by the judiciary which would erode the basic core group known as the family and serve to lessen the parental influence would thus be completely at odds with what has been viewed best by the Congress, state legislature, and by American society as a whole. This view was echoed by the Michigan Court of Appeals in ***Paige v. Bing Construction Co.***, 61 Mich. App. 480, 233, N.W. 2d 46 (1975):

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[6] *E.g.*, Mass. Gen. Laws chapter 207, §7 (marriage); Mass. Gen. Laws chapter 273 §1 (which sets criminal penalties for desertion and non-support); Mich. Comp. Laws Ann.750.136 (which sets criminal penalties for child abuse); Mich. Comp. Laws Ann. 750.137 (which prohibit second-hand dealers from purchasing goods from minors under 18 years of age without the written consent of the parent); Mass. Gen. Laws chapter 138 §34 (which forbids the sale or delivery of alcoholic beverages to minors under 18); Mass. Gen. Laws chapter 231 §85P (which establishes that persons who reach the age of 18 have the full legal capacity to contract); Mass. Gen. Laws chapter 272 §29A, (which imposes criminal penalties for the dissemination of visual materials which depict a child under 18 in a state of nudity or participating in acts of sexual conduct.)

> Parents have a social and moral obligation to provide maintenance and guidance for their children, and the state benefits from their meeting this obligation. The law does step into this private relationship where the child's well-being is seriously affected. Each parent has unique and inimitable methods and attitudes on how children should be supervised. Likewise, each child requires individualized guidance depending on intuitive concerns which only a parent can understand. Also, different cultural, educational and financial conditions affect the manner in which differant parents supervise their children. Allowing a cause of action for negligent supervision would enable others, ignorant of any standards, to second-guess a parent's management of family affairs considerably beyond these statutory protections.
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> Despite the rapidly changing nature of our society in these the most turbulent of times, there is a continuing need for parental discipline and control over children within the sphere of the family. We conclude that to take a step which could unduly disturb and further erode the harmony of the family is unwarranted considering the practical impossibility of logically distinguishing between "authority" and "supervision" on a case-by-case basis. 61 Mich. App. at 485-486.

Thus, absent a clear case of neglect or abuse, parents must be presumed to have their child's best interest as their foremost goal.

In this case, there is no compelling reason for judicial interference with parental rights and duties to control, protect, support, guide, and educate their children. The parent-surrogates who counsel minors at the abortion clinics should not be free to second-guess parents, re-educate their children, and hide their activities behind a veil of secrecy. Professor Hafen has written:

The activity of raising a family is heavily value-laden. The existence of a broad discretion in parents to express strongly felt preferences and values in context of the family unit is consistent with our society's commitment not only to tolerating and protecting, but also to encouraging ideological diversity and freedom. It is especially fitting to respect that freedom in the case of the rights of parents since reasonable men and women differ, often to great extremes, on the question of what constitutes optimal child-rearing practices. This does not ignore the fact that a great many parents are inept, ill-informed, and in some ways unreasonable and incompetent. Not surprisingly, children of such parents, not to mention juvenile court personnel and social workers, are not enthusiastic about these poor qualities. But it is also true that children (and their advocates) are often vehemently unenthusiastic about the qualities of quite competent parents. That being the case, it would be improper to judge the merits of parental conduct by a standard that would reflect the particular values of the court or a segment of the community, rather than by standards of neglect and abuse (Citation omitted) B. Hafen, ***Status Offenses and Children's Rights: Do Children Have a Legal Right to be Incorrigible,*** 1976 B.Y.U. L. Rev. 659 at 679. (hereinafter referred to as Hafen).

Professor Hafen also states that it is often in the best interest of the child to leave parental discretion free of outside interference in order to give the child a feeling of security and continuity and that it may well be a child's "right" to be subject to parental discipline.

> It is inherent in the concept of discipline that the one subject to it does not regard it as being in his or her interest. For that reason, an acceptance of the idea of discipline is practically syonymous with some degree of authoritarianism. Unless one rejects the idea that being subject to some restrictions and discipline can be a healthy part of a child's upbringing, some concession in favor of parental authority is inescapable. State intervention that tends to weaken parental discipline or encourage its disregard by a child would thus not necessarily be a service to the child, even if welcomed by the child at the time it occurred. ***Hafen, supra*** at 680-681.

In expanding these two arguments, it is necessary to keep in mind that children today are being propelled into situations which were almost unheard of just a decade ago. A minor is faced with the daily realities of sex, drugs, intense peer pressure, crime, media "blitzes", etc. The list is endless–and staggering. Children are simply not prepared–intellectually, emotionally, and physically–to cope with such an onslaught. They need parental guidance, especially when faced with the immense and important decision of how to deal with an unplanned pregnancy.

Who is better able than parents to provide a haven of some solidarity to a child confronted by such influences? And who is better aware of an ***individual*** child's limited judgment, experience, and capacity to encounter and deal with the pressure of life than the child's parents.?

The Appellees seem to argue that children are capable of making decisions which will mold and fundamentally influence the future course of their lives without the necessity of consultation with their parents. Possibly, an ***exceptional*** 16, 17, or 18-year old could make such important decisions, but their ability to do so on a consistent basis is doubtful. When 9, 10, and 11-year olds are being encouraged to "decide" based on the same variables that face an adult, the Appellees' position approaches

absurdity. Can it honestly be argued that these children should be left to the counsel of a state-supported or financially interested surrogate when the parent is available? Certainly minors–from 9 to 18–would be hard-pressed to assume all the consequences of their autonomous decision-making, even assuming a developing competence to consider the variables involved. Can the Appellees assert that parental exclusion is really in the best interest of the child?

> It has nevertheless been argued that concerns about state intervention into family life should apply not only to direct acts by state agents, but also to the use of state resources as supports for parental intervention seems to derive from a philosophical position that opposes not only governmental action but also any authoritarian interference with the lives of children. Ironically, limiting parental authority on behalf of children, perhaps in the form of more far-reaching recognitions of children's rights in contexts where their actual needs for protection are not at stake. It is not possible for the state to remain truly neutral, particularly when parents begin with a position of authority over their children within the inherent status quo. Denying a portion of parental authority necessarily adds to the authority of children. Such an addition may be appropriate when the circumstances make it clear ***in an individual case*** that children have some special need. But, as long as the limited capacities of children make it either impossible, unrealistic, or unfair to them to let them assume full responsibility for their own lives, ultimate control over their conduct must and will necessarily rest either with their parents or with the state. Thus, reducing parental authority simply creates an increased state involvement. That, it is submitted, would be the worse of two potential evils. B. Hafen, ***Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth To Their "Rights"***, 1976 B.Y.U. L. Rev. 605, 654-655. (emphasis added).

Accord, R.H. Mnookin, "Children's Rights: Legal and Ethical Dilemmas," ***The Transcript,*** Summer 1978 at 5.

The record does not demonstrate a "compelling" necessity for the confidential relationship for which Appellees sought the approval of the federal courts, and the District Court's opinion cites none which would authorize a state judge to exclude parents by ***ex parte*** order. Given the lack of evidence to support amuthing but speculation as to parental action or reaction and the heavy burden of proof imposed upon those who seek to have the First and Fourteenth Amendment consideration implicit in this action set aside, the judgment of the District Court itself is an unconstitutional infringement of familial and parental rights insofar as it purports to authorize ***ex parte*** (judicial action in non-emergency situations with regard to either "bypass" or a finding of maturity; an abuse of judicial power insofar as it purports to substitute its views for those of the Massachusetts legislature; and an erroneous statement of the law insofar as it purports to hold that ***Roe v. Wade***, 410 U.S. 113 (1973) changes well-settled law recognizing parental interests and makes the child's "best interests" (defined as an abortion) superior to the rights of the parents in all cases.

III. ABORTIONAL RIGHTS ARE NOT UNCONSTITUTIONALLY BURDENED BY THE MASSACHUSETTS ACT WHICH REQUIRES PARENTAL NOTIFICATION AND CONSULTATION PRIOR TO THE PERFORMANCE OF ABORTION SURGERY ON CERTAIN PREGNANT MINORS.

A. Neither *Roe v. Wade* Nor *Planned Parenthood v. Danforth* Confers Upon All Pregnant Minors the Unqualified Right to Have an Abortion.

In *Roe v. Wade*, 410 U.S. 113, 153-55 (1973), this Court held that the right of personal privacy included the right of women to freely choose to have an abortion during the first two trimesters of pregnancy. Therefore, the court held unconstitutional a Texas statute which prohibited *all abortions* except those procured for the purpose of saving the life of the mother. *Id.* at 164. Since the *Roe* decision did not involve the important and complex issues raised by state attempts to regulate abortion surgery on pregnant minors, the limited principles announced in that case were not intended to resolve issues such as those raised in the instant appeal.

It should be noted, however, that this Court made it clear in *Roe*, its first major abortion decision, that the fundamental right it announced did not confer upon all pregnant women a right to unilaterally dictate when, where, and under what circumstances an abortion would be performed. For example, the Court distinguished between first trimester abortions and post-viability abortions, holding that the state had greater and more compelling interests in regulating the latter category of abortions.

Indeed, this Court expressly held that the states could require that all abortions, including first trimester abortions, be performed by licensed physicians. *Roe v. Wade* 410 U.S. 113, 165 (1973). Moreover, the Court recognized that important state interests respecting *adult* abortion surgery may be protected as long as unconstitutional interference with the patient/physician decision to terminate a pregnancy does not result. *Id.* at 149-50.

In the more recent decision of *Maher v. Roe*, 432 U.S. 464 (1977), this Court has warned that *Roe* is not to be interpreted as conferring an unqualified right to an abortion:[7]

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[7] Since *Roe v. Wade*, this Court has upheld a number of abortion restrictions even though they regulated *adult* abortion patients. *See, e.g., Doe v. Bolton*, 410 U.S. 179 (1973) (statute requiring that all abortions be performed by licensed physicians, who must first determine through the use of their "best clinical judgment that an abortion is necessary" held constitutional); *Connecticut v. Menillo*, 423 U.S. 9, 10-11, (1975) (*per curiam* opinion holding that state may constitutionally require that abortions be performed only by medically competent personnel under conditions insuring maximum safety for the woman); and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60-67 (1976) (state may constitutionally require written, informed consent from the mother prior to initiation of surgical procedures).

[8] It is the position of your *amici* that the portion of the *Danforth* decision concerning parental consent is unsupported by sound constitutional principles and public policy. Many states have long-standing parental consent requirements. *See* discussion *supra* at Part I. B. (3). Preeminent among these are parental consent requirements for minor marriages. Obviously, there are compelling, as well as rational, reasons for such requirements even though they impact on the First Amendment associational rights of minors. Certainly, these associational rights are no less important in our constitutional scheme than a minor's right to an abortion. Nevertheless, since *amici* believe that *Danforth* supports the instant statute, rather than renders it unconstitutional, it is unnecessary for this Court to reverse its decision in *Danforth in order to uphold the challenged statute herein.*

> The right in ***Roe v. Wade*** can be understood only by considering both the woman's interest and the nature of the State's interference with it. ***Roe*** did not declare an unqualified constitutional right to an abortion. ***Id*** at 478. ***See also Bellotti v. Baird (I)***, 428 U.S. 132, 147 (1976):

The first application of this analysis by the Supreme Court to a statute regulating abortion surgery on minor patients was in ***Planned Parenthood of Central Missouri v. Danforth***, 428 U.S. 52 (1976). In ***Danforth***, this Court, by the narrow margin of five-to-four, held that a state could not enact a statute which required a minor to obtain parental consent as an absolute prerequisite for obtaining an abortion.[8] Justices Blackmun, Brennan, and Marshall, joining in the Court's decision, noted that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." ***Id.*** at 75.

The principal distinguishing feature between the challenged statute in ***Danforth*** and that of Massachusetts is that the former gave parents an absolute power to veto the abortion decision of the pregnant minor in all instances. Under a narrow construction of the Massachusetts statutes, parents are merely granted a right to be notified of the minor's abortion-related activities and a qualified right to influence her decision respecting the procurement of an abortion. ***Baird v. Attorney General***, Mass. Adv. Sh. (1977) 96, 360 N.E. 2d 288, 292, 303 (1977).

This key difference between the two parental rights' statutes was emphasized in the concurring opinion of Justice Stewart, joined by Justice Powell, who indicated that a statute requiring

parental notification/consultation would be constitutionally permissible:

> With respect to the state law's requirement of parental consent, § 3(4), we think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in ***Bellotti v. Baird***, 428 U.S. 132, 147-148 suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. ***Planned Parenthood of Missouri v. Danforth***, 428 U.S. 52, 90-91 (1976).

Justice White, Chief Justice Burger, Justice Rehnquist, and Justice Stevens dissented in ***Danforth*** and indicated that, in their opinion, the more stringent parental consent restrictions contained in the Missouri statute were constitutional. 428 U.S. at 95, 104. When the opinions of the dissenting Justices are combined with the comments by Justice Stewart, it becomes apparent that a majority of this court feels that state parental notification/consultation provisions, such as those challenged in the instant case, are constitutional.

Such a posture is clearly dictated by the Court's auxiliary decision in ***Danforth*** upholding a requirement that written consent to abortion surgery be given by adult abortion patients:

> The decision to abort, indeed, is an important and often stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decisions and its signficance may be assured, constitutionally, by the State to the extent of requiring her written consent. 428 U.S. at 66-67.

The added features of the Massachusetts statute – notification and consultation – merely insure that equivalent informed consent is given by minor patients.[9]

Your *amici* contend that the Massachusetts statute, as interpreted by the Supreme Judicial Court on remand, is constitutional under *Danforth*. The statute does not make parental consent an absolute prerequisite to minor patient abortions; rather it assures that needed consultation and advice will be given to pregnant minors contemplating abortion surgery. Any disagreement between the pregnant minor and her parents will be resolved judicially in an expeditious manner. Moreover, the court may, in any event, grant consent if it feels the abortion is in the minor's best interest. *See Baird v. Attorney General*, 360 N.E. 2d at 293. Therefore, the statute should be upheld as constitutional by this Court.[10]

B. The Massachusetts Provisions Regarding Parental Notificational/Consultation Are Supported by Both Compelling State Interests in Child Welfare and Rational Legislative Judgment.

The constitutional test of any state law which impacts upon "the freedom of action of young people in sexual matters is whether the restriction rationally serves valid state interests."

Carey v. Population Services International, 431 U.S. 678, 707 (1977) (Powell, J. concurring); *Maher v. Roe*, 432 U.S. 404 (1977). It is manifestly evident that the Massachusetts statute involved in the instant case is rationally linked with legitimate state interests. Assuming, *arguendo*, that the statute impacts on fundamental abortional rights of minors in a manner which requires a compelling state justification, it is clear that such justification exists.

Amici have demonstrated the existence of fundamental parental rights to care for, educate, and maintain custody of their children, which the state may protect through appropriate legislation, in Parts I and II of this Argument. They have also demonstrated the need and justification for parental notification/consultation when minor children seek abortion surgery. Morever, the compelling need for parental notification/con-

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9 The need for parental consultation is heightened by the documented failure of many abortion clinics to fully inform and advise their patients regarding the desireability and/or consequences of abortion surgery. *See* Brief of Defendant-Intervenor Jane Hunerwadel at 22, 23, n.16.

10 It should be noted that parental notification in no way violates a minor's ostensible right to an "anonymous abortion." The privacy right articulated in *Roe* does not encompass a right to have the abortion anonymously. This Court has sustained, against constitutional attack, state abortion record keeping. Provision of such information to the state may be "unpleasant" in some cases. It might even cause some patients to "avoid or postpone abortion surgery;" and it could reflect adversely on the character of the patient. However, this does not automatically constitute a violation of the privacy rights expressed in *Roe*. *Whalen v. Roe*, 429 U.S. 589, 602 (1977).

sultation when a minor child contemplates having an abortion was clearly and articulately demonstrated at trial. To briefly summarize: (1) there is a need for parental support and guidance respecting the abortion decision (App. II, 44, 47, 51-52, 103, 104, 137, 226, 249); and (2) there is a need for assistance in the selection of a physician and medical facilities (App. II, 70-71, 185-86, 203-204, 207).

These functions are not adequately fulfilled by the state, or potentially self-interested abortion clinic personnel; moreover, these functions are not the primary responsibilities of either of these entries. The "primary role of parents in the upbringing of their children is now established beyond debate . . ." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Given these compelling parental interests, and the fact that the Massachusetts statute does not impermissibly impact on fundamental privacy rights of pregnant minors, this Court should reverse the decision of the lower court and hold the Parental Notification/Consultation Provisions constitutional.

CONCLUSION

It is evident that the Massachusetts Parental Notification and Consultation requirements for minors contemplating an abortion reflect the well-settled and fundamental principle that parents have the primary right and duty to care, educate, and maintain custody of their minor children. Moreover, the notification and consultation requirements do not unduly burden a minor's abortional rights. Under the principles announced by five Justices of the Court in *Danforth*, these provisions are clearly constitutional. For all of the above-stated reasons, *amici* request that this Court reverse the order of the District Court below.

Respectfully submitted,

Stuart D. Hubbell
Robert A. Destro
Robert M. Andersen
Attorneys for *Amici*
Catholic League for Religious and Civil Rights,
the Michigan District Lutheran Church (Missouri Synod),
Michigan District, Christian Reformed Church in
North America.

January 25, 1979

CERTIFICATE OF SERVICE

I, Stuart D. Hubbell, attorney for ***Amici Curiae*** in this case, being a member of the bar of the Supreme Court of the United States, do hereby certify that I have caused a true and correct copy of the foregoing motion to be served upon Appellants, Appellant/Intervenors, Appellee/Intervenors, and Appellees, they being the parties of record by depositing copies of said brief in a United States Post Office mailbox, with first-class postage prepaid addressed to: Francis X. Bellotti, Office of the Attorney General, the Commonwealth of Massachusetts, John W. McCormack State Office Building, One Ashburton Place, Boston, Massachusetts 02108, and Garrick F. Cole, Office of the Attorney General, the Commonwealth of Massachusetts, John W. McCormack State Office Building, One Ashburton Place, Boston, Massachusetts 02108, attorneys for Appellants; Brian Riley, 40 Court Street, Boston, Massachusetts 02108, attorney for Appellant/Intervenor Jane Hunerwadel; John Henn, Hoag & Eliot, 10 Post Office Square, Boston, Massachusetts 02108, attorney for Appellee/Intervenor Planned Parenthood League of Massachusetts, ***et al.***; Joseph Balliro, 1 Center Plaza, Boston, Massachusetts 02108; attorney for Appellees; and Victor G. Rosenbloom, ***et al.***, 230 North Michigan Ave., Suite 515, Chicago Illi-

nois 60601, attorneys for ***Amici*** Americans United For Life, Inc. and Eugene F. Diamond, M.D. on this 25th day of January, 1979.

Stuard D. Hubell
Attorney for ***Amici***

MOTION FILED
JAN 16 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-329, 78-330

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, *et al.*,

Appellants,

JANE HUNERWADEL,

Appellant,

—v.—

WILLIAM BAIRD, *et al.*,

Appellees,

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, CRITTENTON HASTINGS HOUSE & CLINIC and PHILLIP G. STUBBLEFIELD, M.D.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND ANNEXED BRIEF OF THE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., THE YWCA NATIONAL BOARD, THE NATIONAL FAMILY PLANNING FORUM, INC., THE AMERICAN ACADEMY OF CHILD PSYCHIATRY, THE SOCIETY FOR ADOLESCENT MEDICINE, THE ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS, THE AMERICAN PUBLIC HEALTH ASSOCIATION AND CERTAIN MEDICAL SCHOOL DEANS, PROFESSORS AND INDIVIDUAL PHYSICIANS

(Names of Individual *Amici* appear within)

EVE W. PAUL
c/o Planned Parenthood Federation of America, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

HARRIET F. PILPEL
437 Madison Avenue
New York, New York 10022
(212) 758-4010

Attorneys for Amici Curiae

Of Counsel:
SYLVIA A. LAW
GREENBAUM, WOLFF & ERNST

Individual *Amici*

RALPH C. BENSON, M.D.
Professor and Chairman Emeritus*
Department of Obstetrics & Gynecology
University of Oregon Health Sciences Center
Portland, Oregon 97201

ROBERT W. BERLINER, M.D.
Dean
Yale University School of Medicine
333 Cedar Street
New Haven, Connecticut 06520

JACK BLECHNER, M.D.
Professor and Head of
Department of Ob/Gyn
University of Connecticut Health Center
263 Farmington Avenue
Farmington, Connecticut 06032

DANIEL K. BLOOMFIELD, M.D.
Dean, School of Basic Medical Sciences
Urbana-Champaign
University of Illinois, College of Medicine
Urbana, Illinois 61801

F. J. BONTE, M.D.
Dean & Professor of Radiology
The University of Texas
Southwestern Medical School
Dallas, Texas 75235

THOMAS C. CHALMERS, M.D.
President and Dean
Mount Sinai School of Medicine
5th Avenue and 100th Street
New York, New York 10029

---

* Titles and affiliations for identification purposes only.

NICHOLAS J. COTSONAS, JR., M.D.
Dean
University of Illinois College of Medicine
Peoria School of Medicine
123 SW Glendale Avenue
Peoria, Illinois 61605

ROBERT D. COYE, M.D.
Dean
Wayne State University School of Medicine
540 East Canfield
Detroit, Michigan 48201

MORTON C. CREDITOR, M.D.
Associate Dean
School of Clinical Medicine
190 Medical Sciences Bldg.
University of Illinois
Urbana, Illinois 61801

PRESTON V. DILTS, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Tennessee
853 Jefferson Avenue
Memphis, Tennessee 38163

GORDON W. DOUGLAS, M.D.
Professor and Chairman
Dept. of Ob/Gyn
New York University School of Medicine
550 First Avenue
New York, New York 10016

LEO J. DUNN, M.D.
Professor and Chairman
Obstetrics and Gynecology
Box 34
Medical College of Virginia
Richmond, Virginia 23298

ROBERT H. EBERT, M.D.
Former Dean, Harvard Medical School
President, Milbank Memorial Fund
1 East 75 Street
New York, New York 10021

KENNETH EDELIN, M.D.
Professor and Acting Chairman
Department of Ob/Gyn
Boston University School of Medicine
80 East Concord Street
Boston, Massachusetts 02118

T. N. EVANS, M.D.
President of the American Gynecological Society
Past President of the American College of
Obstetricians & Gynecologists
Professor and Chairman of
Gynecology and Obstetrics
Wayne State University School of Medicine
Detroit, Michigan 48201

CHARLES E. FLOWERS, JR., M.D.
Professor and Chairman
Department of Ob/Gyn
University of Alabama in Birmingham
University Station
Birmingham, Alabama 35294

HENRY W. FOSTER, JR., M.D.
Professor and Chairman
Department of Ob/Gyn
Meharry Medical College
1005 18 Avenue North
Nashville, Tennessee 37208

FRITZ FUCHS, M.D.
Harold and Percy Uris Professor of
Reproductive Biology and Professor
of Obstetrics and Gynecology
Cornell University Medical College
New York, New York 10021

JOHN W. GREENE, JR., M.D.
Professor and Chairman
Department of Ob/Gyn
University of Kentucky Medical Center
Lexington, Kentucky 40506

S. B. GUSBERG, M.D.
Professor and Chairman of
Department of Obstetrics & Gynecology
The Mt. Sinai School of Medicine
1176 Fifth Avenue
New York, New York 10029

ARTHUR L. HASKINS, M.D.
Professor and Head
Department of Ob/Gyn
University of Maryland Hospital
Baltimore, Maryland 21201

T. TERRY HAYASHI, M.D.
Chief of Obstetrics & Gynecology
Magee Womens Hospital
Forbes & Halket
Pittsburgh, Pennsylvania 15213

CHARLES H. HENDRICKS, M.D.
Professor and Chairman
Ob/Gyn
University of North Carolina
Chapel Hill, North Carolina 27514

LAWRENCE L. HESTER, JR., M.D.
Professor and Chairman
Department of Ob/Gyn
Medical University of South Carolina
171 Ashley Avenue
Charleston, South Carolina 29403

ANDREW D. HUNT, M.D.
Coordinator
Medical Humanities Program
C215 E. Fee Hall
Michigan State University
East Lansing, Michigan 48824

IRWIN H. KAISER, M.D.
Professor-Director
Department of Obstetrics & Gynecology
The Hospital of Albert Einstein
College of Medicine
1825 Eastchester Road
Bronx, New York 10461

HAROLD A. KAMINETZKY, M.D.
Professor and Chairman
Department of Ob/Gyn
Martland Hospital
Newark, New Jersey

RAYMOND H. KAUFMAN, M.D.
Professor and Chairman
Department of Ob/Gyn
Baylor College of Medicine
Houston, Texas 77030

WILLIAM C. KEETTEL, M.D.
Professor and Head
Department of Ob/Gyn
University of Iowa Hospital
Iowa City, Iowa 52240

THOMAS H. KIRSCHBAUM, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Michigan State University
East Lansing, Michigan 48824

SCHUYLER G. KOHL, M.D.
Professor
Department of Obstetrics & Gynecology
Downstate Medical Center
450 Clarkson Avenue
Brooklyn, New York 11203

KERMIT E. KRANTZ, M.D., LITT.D.
Professor and Chairman
Department of Gynecology and Obstetrics
University of Kansas Medical Center
Kansas City, Kansas 66103

JAMES H. LEE, JR., M.D.
Professor and Chairman
Department of Obstetrics & Gynecology
Jefferson Medical College
Thomas Jefferson University
1025 Walnut Street
Philadelphia, Pennsylvania 19107

HARRY M. LITTLE, JR., M.D.
Associate Professor
Department of Ob-Gyn
University of Texas Medical Branch
Galveston, Texas 77550

ERNEST W. LOWE, M.D.
Professor
Department of Ob/Gyn
Boston University
School of Medicine
720 Harrison Avenue
Boston, Massachusetts 02118

SHERMAN M. MELLINKOFF, M.D.
Dean
UCLA School of Medicine
Los Angeles, California 90024

F. NAFTOLIN, M.D., D. PHIL.
Professor and Chairman
Department of Obstetrics and Gynecology
Yale University School of Medicine
Chief, Department of Obstetrics & Gynecology
Yale-New Haven Hospital
333 Cedar Street
New Haven, Connecticut 06510

ROBERT E. L. NESBITT, JR., M.D.
Professor and Chairman
Dept. of Ob/Gyn
State University of New York
Upstate Medical Center
750 East Adams Street
Syracuse, New York 13210

KENNETH R. NISWANDER, M.D.
Professor and Chairman
Department of Ob/Gyn
University of California at Davis
Sacramento, California 95817

ROY T. PARKER, M.D.
F. Bayard Carter Professor & Chairman
Department of Obstetrics & Gynecology
Duke University Medical Center
Durham, North Carolina 27710

BEN M. PECKHAM, M.D.
Professor and Chairman
Department of Ob/Gyn
University of Wisconsin
Medical School
1300 University Avenue
Madison, Wisconsin 53706

L. CHARLES POWELL, JR., M.D.
Professor
Department of Ob-Gyn
University of Texas Medical Branch
Galveston, Texas 77550

E. J. QUILLIGAN, M.D.
Professor and Chairman
University of Southern California
Department of Ob/Gyn
1240 Mission
Los Angeles, California 90033

ARTHUR P. RICHARDSON, M.D.
Dean
Emory University School of Medicine
Atlanta, Georgia 30322

DANIEL K. ROBERTS, M.D.
Professor and Chairman
Department of Ob/Gyn
Wichita State University Branch of the
University of Kansas School of Medicine
Chief, Ob/Gyn Service
Director, Ob/Gyn Education
Wesley Medical Center
550 North Hillside
Wichita, Kansas

SEYMOUR L. ROMNEY, M.D.
Professor
Albert Einstein College of Medicine
1300 Morris Park Avenue
Bronx, New York 10461

KENNETH J. RYAN, M.D.
Chief of Staff
Boston Hospital for Women
221 Longwood Avenue
Boston, Massachusetts 02115

RICHARD H. SCHWARZ, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
State University of New York
Downstate Medical Center
450 Clarkson Avenue
Brooklyn, New York 11203

JOHN J. SCIARRA, M.D., PH.D.
Chairman
Department of Obstetrics and Gynecology
Northwestern University Medical School
333 East Superior Street
Chicago, Illinois 60611

Joseph Seitchik, M.D.
Professor and Chairman
Department of Ob/Gyn
University of Texas
Health Science Center at
San Antonio Medical School
7703 Floyd Curl Drive
San Antonio, Texas 78284

Robert J. Slater, M.D.
Director, Medical Programs
National Multiple Sclerosis Society
205 East 42 Street
New York, New York 10017

William N. Spellacy, M.D.
Professor and Chairman
Department of Obstetrics-Gynecology
University of Florida College of Medicine
Gainesville, Florida 32610

Robert C. Stepto, M.D.
Chairman
Department of Obstetrics & Gynecology
Mt. Sinai Hospital Medical Center
Chicago, Illinois 60608

Donald P. Swartz, M.D.
Professor and Chairman
Department of Obstetrics & Gynecology
Albany Medical College
Albany, New York 12208

W. Norman Thornton, Jr., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Virginia School of Medicine
Charlottesville, Virginia 22901

Allan B. Weingold, M.D.
Professor and Chairman
Department of Ob/Gyn
George Washington University
2150 Pennsylvania Avenue NW
Washington, D.C. 20037

W. Donald Weston, M.D.
Dean
College of Human Medicine
A-118 East Fee Hall
Michigan State University
East Lansing, Michigan 48824

J. Robert Willson, M.D.
Professor
Department of Gynecology & Obstetrics
University of Michigan
Medical Center
Ann Arbor, Michigan 48104

R. M. Wynn, M.D.
Department of Obstetrics and Gynecology
University of Arkansas for Medical Sciences
4301 W. Markham
Little Rock, Arkansas 72201

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Appellant,

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The undersigned, as counsel for the Planned Parenthood Federation of America, Inc., the YWCA National Board, the National Family Planning Forum, Inc., the American Academy of Child Psychiatry, the Society for Adolescent Medicine, the Association of Planned Parenthood Physicians, the American Public Health Association and 59 medical school deans, professors and individual physicians respectfully move this Court for leave to file the accompanying brief *amici curiae.*

Planned Parenthood Federation of America, Inc.

Planned Parenthood Federation of America, Inc., also known as Planned Parenthood-World Population (Planned Parenthood), is a not-for-profit corporation organized in 1922 and existing under the laws of the State of New York. Its headquarters are in New York City. It is the leading national voluntary public health organization in the field of family planning.

Planned Parenthood has 189 affiliates in 43 states and the District of Columbia, all of them separate not-for-profit entities. These affiliates operate approximately 725 family planning clinics offering services to the public. Most affiliates offer medical services including 31 which offer abortion services as part of their program. Nine affiliates, including the Planned Parenthood League of Massachusetts, one of the Appellees herein, are educational units without medical services. Most Planned Parenthood affiliates which do not perform abortions themselves offer pregnancy counseling and referral.

Planned Parenthood provides its affiliates with guidance in the areas of contraception, voluntary sterilization, infertility, abortion, sex education and education for marriage and parenthood. Each of the affiliates offering med-

ical services functions under strict medical standards promulgated by the National Medical Committee in conjunction with local medical advisory committees. These committees are made up of health professionals, the large majority of whom are physicians.

Planned Parenthood also functions as a clearing house for information and services relating to these same areas. It formulates medical and clinical standards which are available to its affiliates and generally on a nationwide basis and develops guidelines and materials relating to public and professional education in all aspects of family planning. Its Medical Director and other consultants confer with other national medical organizations, medical school faculties and local agencies in relation to teaching techniques, formation of clinics and the like.

Many of Planned Parenthood's affiliates operate in cooperation with local public health facilities. The affiliates are also teaching and training centers for physicians, nurses, teachers and social workers from this country and foreign countries and provide referral services for their clients to qualified medical specialists and facilities.

Planned Parenthood is committed to the principle that safe abortions should be available to all who seek them as a necessary corollary of Planned Parenthood's activities in the area of contraception. While Planned Parenthood does not view abortion as an alternative to contraception, it recognizes that abortion services are essential to protect women where contraception is unavailable, where it has not been used for some other reason and where it has failed.

Planned Parenthood's Medical Standards and Guidelines contain requirements for adequate pregnancy and abortion counseling which include standards for the qualifications

and training of counseling personnel. These Standards and Guidelines provide: "If patient consents, efforts should be made to involve significant members from the women's environment in the counseling process—i.e., boyfriend, husband, parents or others who may lend support." Planned Parenthood Manual of Medical Standards and Guidelines, Part One, Section VII-C (revised July 31, 1978). However, consent for the abortion must be required only of the woman who chooses the procedure. Manual of Medical Standards and Guidelines, Part One, Section VII-A (December 15, 1977).

YWCA National Board

The YWCA, a not-for-profit corporation, is the oldest and largest multiracial, multicultural women's membership organization in the world. It has a Christian purpose which involves women of diverse backgrounds and faiths in the struggle for peace, dignity, freedom and justice for all people.

The National Planning Forum, Inc.

The National Family Planning Forum is a private not-for-profit corporation composed of more than 400 agencies, organizations and consumer members. The members represent every type of family planning agency, including State and City Departments of Health, hospitals, free-standing clinics, non-profit Councils and reproductive health clinics. The membership includes broad representation from both urban and rural programs.

The primary mission of the National Family Planning Forum is to improve the delivery and availability of family planning services in the United States. The Forum was incorporated in 1974 but has existed as a national organization since 1970. It has played a major leadership role in the development of high quality family planning services in the United States.

American Academy of Child Psychiatry

The American Academy of Child Psychiatry is a professional association of 2,000 child psychiatrists. It was founded in 1952 and is concerned with advancing child and adolescent mental health.

Society for Adolescent Medicine

The Society for Adolescent Medicine is a national organization of health care providers to the adolescent age population. It consists of 800 members all of whom are physicians and health professionals.

Association of Planned Parenthood Physicians, Inc.

Planned Parenthood works closely with the Association of Planned Parenthood Physicians, Inc. (APPP), a New York not-for-profit corporation organized in 1974. APPP is the successor to the American Association of Planned Parenthood Physicians, an unincorporated association which was organized in 1963. In 1978, APPP had 850 members, all of whom were physicians or other health professionals associated with family planning.

APPP was formed for scientific, educational and charitable purposes and specifically to promote the ongoing interest in family planning in order to improve the stability and health of the family through responsible parenthood.

American Public Health Association

The American Public Health Association is a national non-governmental organization established in 1872. Its

object is to protect and promote personal and environmental health. With a membership of over 50,000, it is the largest public health organization in the world. Within this membership, both professional health workers and consumers act in a leadership role to develop a national policy to provide equitable, quality health care for all citizens.

Medical School Deans, Professors and Individual Physicians

The 59 individual physicians who as *amici* subscribe to this brief all practice obstetrics and gynecology as their medical specialty or are responsible for the education of medical students and residents, some of whom are in training in the specialty of obstetrics and gynecology.

Concerns of the *Amici*

Amici have a longstanding concern with the problem of teenage sexual activity and the attendant risk of teenage pregnancy which involves more than half the adolescent population. *11 Million Teenagers* (Alan Guttmacher Institute 1976); Klein, "Antecedents of Teenage Pregnancy," 21 Clinical Obstetrics & Gynecology, No. 4, pp. 1151-1159 (Harper & Row Medical Dep't 1978). Over 40% of the women in the United States aged 15-19 years in 1976 had experienced pre-marital intercourse; over a million teenagers experienced a pregnancy, of which an estimated 780,000 were premarital. Zelnik and Kantner, "Contraceptive Patterns and Premarital Pregnancy among Women Aged 15-19 in 1976," 10 Family Planning Perspectives 135 (1978). Over 570,000 live births to women under 20 were registered in 1976. In the same year, many other teenagers suffered miscarriages and over 300,000 obtained abortions, accounting for approximately one-third of all abortions

obtained. Tietze, "Teenage Pregnancies: Looking Ahead to 1984," 10 Family Planning Perspectives 205 (1978).

Births to adolescent mothers often have crippling health, psychological, economic and educational consequences for mother and child. *Amici* believe that the Massachusetts statute which the United States District Court declared unconstitutional in this case would, if that judgment were reversed by this Court, prevent many teenaged women from obtaining abortions that they want and need. By mandating parental consent or notification in all cases, the statute would, moreover, cause other teenaged women to postpone the termination of their pregnancies to a later stage when the health hazards of abortion are far greater. *Amici* agree that pregnant minors should consult their parents, but because some minors will in no circumstances do so and because for others, parents may not be the best source of counseling, *amici* believe that the Massachusetts statute unconstitutionally interferes with the right of physicians to administer necessary health care in accordance with their best professional judgment and the right of adolescent women to receive such health care.

Planned Parenthood, the National Family Planning Forum, Inc., the National Board of the YWCA, the American Academy of Child Psychiatry, the Society for Adolescent Medicine, APPP, the American Public Health Association and the individual medical school deans, professors and physicians named above, by reason of their long experience and knowledge of the health needs of adolescents believe that they are in a unique position to aid the Court in its resolution of the issues raised in this case. *Amici* have assembled relevant and recent scientific findings which are discussed herein.

Consent of Parties to Filing of Brief

Amici have sought the consent of the parties to file this brief. Counsel for the Appellees have consented. Counsel for the Appellants has consented to the filing of an *amicus* brief by the American Public Health Association but not by the Planned Parenthood Federation of America, Inc. or the Association of Planned Parenthood Physicians.

Respectfully submitted,

EVE W. PAUL
c/o Planned Parenthood Federation of America, Inc.
810 Seventh Avenue
New York, New York 10019

HARRIET F. PILPEL
437 Madison Avenue
New York, New York 10022

Attorneys for Amici

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-329, 78-330

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, *et al.*,

Appellants,

JANE HUNERWADEL,

Appellant,

—v.—

WILLIAM BAIRD, *et al.*,

Appellees,

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, CRITTENTON HASTINGS HOUSE & CLINIC and PHILLIP G. STUBBLEFIELD, M.D.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF *AMICI CURIAE* THE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., THE YWCA NATIONAL BOARD, THE NATIONAL FAMILY PLANNING FORUM, INC., THE AMERICAN ACADEMY OF CHILD PSYCHIATRY, THE SOCIETY FOR ADOLESCENT MEDICINE, THE ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS, THE AMERICAN PUBLIC HEALTH ASSOCIATION AND CERTAIN MEDICAL SCHOOL DEANS, PROFESSORS AND INDIVIDUAL PHYSICIANS

This brief is submitted by the above named *amici curiae* conditionally upon the granting of the motion for leave to file to which it is attached.

Interest of the *Amici*

The interest of the *amici* is set forth in the attached motion for leave to file.

Statutory Provisions Involved

The issue in this case is the constitutionality of Massachusetts General Laws ch. 112, §12 S which defines procedures that must be followed before an unmarried minor can obtain an abortion, as follows:

> If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.
>
> If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient.
>
> The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to

> the physician performing the abortion who shall maintain it in his permanent files.
>
> Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent for the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve U.

This statute comes before this Court for the second time. In *Bellotti* v. *Baird*, this Court remanded the above statute for construction by the Massachusetts courts, stating:

> "The picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from a statute that creates a 'parental veto.'" 428 U.S. 132 at 145 (1976).

In its prior opinion dealing with this statute, this Court warned that it would not uphold a statute that "impose(s) undue burdens on a minor capable of giving an informed consent" or that "creates some unanticipated interference with the doctor-patient relationship." 428 U.S. at 147-148.

The United States District Court for the District of Massachusetts, to which the case was thus remanded, certified nine questions to the Massachusetts Supreme Judicial Court. That court, in answer to the questions certified, construed the Massachusetts statute in an extremely re-

strictive way, in stark and dramatic contrast to "the picture painted by the respective appellants," i.e. the representatives of the State of Massachusetts, when the case was previously argued in this Court.

The Massachusetts Attorney General originally represented the statute as one that, in the words of this Court, "prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation. . . ." However, under the statute as it has now been construed by the Massachusetts Supreme Judicial Court, "parental consultation is required in every instance where an unmarried minor seeks a nonemergency abortion" except where the minor's parents (or their equivalent) are unavailable. *Baird* v. *Attorney General*, Mass. Adv. Sh. (1977) 96, 360 N.E. 2d 288 at 303.

Although the clear implication of this Court's language, quoted above, was that the mature minor need establish only the fact of her maturity in order to be able to give effective consent for an abortion, as construed by the Massachusetts Supreme Judicial Court, if one or both parents refuse consent, a judge of the Superior Court may authorize an abortion only after making a finding "on the basis of all relevant views presented to him . . . (I)n circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail . . ." 360 N.E. 2d at 293.

Despite this Court's plain suggestion that any requirement that would "impose undue burdens on a minor capable of giving an informed consent" was constitutionally defective, the Massachusetts Supreme Judicial Court has held

that the statute mandates for all minors, including all mature minors, a court proceeding in which the minor in effect must sue her own parents as named defendants if she wishes to terminate an unwanted pregnancy against their wishes. The state court has ruled out the judicial proceeding "without parental consultation" which this Court contemplated not only for mature minors but also for immature minors "where there is a showing that the abortion would be in [their] best interests." 428 U.S. at 145.

SUMMARY OF ARGUMENT

Amici in their various capacities have had extensive experience in connection with the treatment of the health needs of adolescents. The Massachusetts law as interpreted by the Massachusetts Supreme Judicial Court places undue burdens on a minor seeking to terminate an unwanted pregnancy. This belief is based on the following grounds: 1) The Massachusetts statute's requirement of parental consent or notification in all cases creates a *de facto* parental veto which must fall under this Court's decision in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976).

2) While *amici* agree that pregnant minors should consult their parents, the medical literature as well as the evidence in this case establishes that some minors will in no circumstances do so and that for many minors parents may not be the best source of counseling.

3) *Amici* will show that in those cases where a minor does attempt to comply with the Massachusetts statute, the mandated procedure will inevitably postpone the termination of many pregnancies, thereby substantially increasing

the health hazards to the pregnant minor if she does succeed in having a legal abortion.

4) The Massachusetts statute denies the equal protection of the laws to those minors who choose to terminate their pregnancies as opposed to those minors who choose to carry their pregnancies to term.

ARGUMENT

POINT I

The Massachusetts statute's requirement of parental involvement in all cases creates an unconstitutional *de facto* veto on minors' abortions in violation of the Due Process Clause of the 14th Amendment to the United States Constitution.

In *Planned Parenthood of Central Missouri* v. *Danforth*, this Court held that a state may not "impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." Although recognizing that "the state has somewhat broader authority to regulate the activity of children than of adults", this Court nevertheless held that the interest advanced by the state in safeguarding the family unit and parental authority must yield to "the right of privacy of the competent minor . . ." This Court ruled that a state does not have the constitutional authority "to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy". 428 U.S. 52 at 74 (1976).

Unwanted teenage pregnancy is a distressingly common problem. A recent comprehensive study of the Department of Health, Education and Welfare (DHEW) Office of Child Health Affairs concluded "Teenage pregnancy . . . is one of the most if not the most pressing health problem of individuals nineteen years of age and under." *Teenage Pregnancy,* 1976, p. 1. Another recent comprehensive study of adolescent health states that it is the consensus of medical experts that teenagers are "biologically at risk in childbearing." DHEW, *Approaches to Adolescent Health Care,* 1975, at p. 17. Yet another high level DHEW study summarized the problems of teenage pregnancy as follows:*

Adolescents are at high risk of pregnancy

- More than four million adolescent females (ages 15-19) have had sexual intercourse—only 2 million use contraceptives. Seven million adolescent males are sexually active.
- Thirty-seven percent of unmarried adolescents (15-19), when interviewed, reported that they did not use any contraceptive method the last time they had sexual intercourse.
- One million adolescents become pregnant annually (one in ten adolescent females); almost 600,000 give birth.
- Nearly 250,000 births (400,000 pregnancies) are to adolescents 17 and under; 130,000 births (30,000 pregnancies) are to adolescents under 15.

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* The Report (hereinafter *Schuck Report*) was the work of a task force of 50 knowledgeable Assistant Secretaries and the General Counsel of DHEW. The group solicited the opinions of many and diverse outside persons who participated in the committee's deliberations through submitting written comments and/or attending two days of public meetings.

Initiative to Address Adolescent Pregnancy and Related Issues —Decision Memorandum, DHEW 1977, pp. 1-2.

- Adolescent birth rates are declining, but more slowly than the rates for older women.

Adolescents receive one-third of all abortions in the United States

- Approximately 300,000 adolescents receive abortions annually; almost half are to those 17 and under.
- Adolescents are over-represented among women receiving second trimester abortions, which pose greater health risks.

Pregnancy during adolescence poses serious health risks for mother and child

- Complications of pregnancy and childbirth are 9-30 percent higher for those under 15 than for women aged 20-24.
- Compared to women 20-24, the incidence of low-birth weight is twice as high for infants of mothers under 15, and 30 percent higher for infants of mothers aged 15-19. Low-birth weight infants run higher risk of death and serious developmental defects.
- Repeated pregnancy during adolescence increases risks to adolescent mothers and their children.

Pregnancy during adolescence raises serious social and economic risks

- Surveys indicate that between one-third and one-half of all adolescent females who drop out of school do so because of pregnancy or marriage. Early parenthood is a major reason for males to drop out of school.

- Adolescent parents run higher risks of unemployment and welfare dependence than those who delay their first child until their twenties.
- One-third of all births to adolescents are out-of-wedlock, one-half of all out-of-wedlock births in the United States.
- Adolescents who marry are 2-3 times more likely to divorce than those who marry in their early twenties.

The adolescent with an unwanted pregnancy is in an extremely difficult and emotionally charged situation which subjects her to constant social, psychological and physiological tension. Regardless of her attitude toward teenage sexual activity, the adolescent woman is usually upset by the fact of her pregnancy and the possibility of parenthood. Shouse, "Psychological and Emotional Problems of Pregnancy in Adolescence", in Zackler and Brandtadt, eds., *The Teenage Pregnant Girl* (Thomas, 1975), pp. 161-168; Martin, "Psychological Problems of Abortion for the Unwed Teenage Girl", 88 Genetic Psychology Monographs 23 (1973). She needs patient, effective counseling, but feels reluctant to approach anyone with what she may perceive to be a shameful, embarrassing or intensely personal problem. She may in fact even attempt to deny the fact of her pregnancy and consequently postpone her efforts to seek guidance, or, more important, medical aid. Baudry and Wiener, "The Pregnant Patient in Conflict About Abortion: A Challenge for the Obstetrician", 119 Am. J. Obst. & Gyn. 705 (1974).

As interpreted by the state court, the Massachusetts statute obligates all minors to seek parental consent and gives them the right to go to court only if they have not been able to obtain the consent of both parents, thereby man-

dating parental notification in every case. Although a requirement of parental involvement will have little impact in those family situations where parents and their children share open and relaxed attitudes on the issue of teenage sexual activity and abortion, where the home environment is indifferent or openly hostile to the minor and/or her pregnancy, the statute as so construed will compel a confrontation at home and in court between bitterly irreconcilable parties.

It is well known that parents exercise great influence over the sexual patterns of their children and that parents who are not supportive of teenage sexual activity or who cannot accept abortion as a method of terminating an unwanted pregnancy react to their daughter's condition in despair, disappointment and even bitterness. Furstenberg, *Unplanned Parenthood: The Social Consequences of Teenage Childbearing* (Free Press 1976). In such circumstances, to compel a young woman to attempt to obtain the consent of parents who are non-supportive or hostile to her own interests or needs will only further traumatize a person already upset by her pregnancy. As one study noted of such minors:

> "Half of them could not bring themselves to tell their parents of their pregnancy for several months; in a quarter of the families, four or more months passed before the pregnancy was disclosed. More often than not, the adolescents never actually told their parents; the mothers learned about it through a third party or detected it on their own. Only 3% of the women said their mothers were pleased, and half recalled that they were angry." Furstenberg, *supra*, p. 55.

A recent study has found:

> "Although a small number of prospective grandparents accept the pregnancy easily, most do not. Initially anger appears to be the most common parental response. This anger may be strong enough that the daughter feels the necessity to leave her home. Accompanying the anger there is often a strong sense of shame and guilt, shame about what neighbors and friends will say and about failed aspirations for the family and offspring, and guilt about what went wrong and what role the parents may have played in inadvertently contributing to the conception". Osofsky & Osofsky, "Teenage Pregnancy: Psychosocial Considerations" in 21 Clinical Obstetrics & Gynecology, No. 4, pp. 1164-1165 (Harper & Row Medical Dep't, December 1978).

Many teenagers, for various reasons, feel that they cannot confide in their parents about their sexual and contraceptive behavior. Recent studies indicate that requiring parental notification will not have the effect of discouraging sexual activity among teenagers or even of increasing substantially the proportion who already willingly tell their parents about their clinic attendance. Instead, any requirement of parental notification with respect to contraception will cause a substantial number of young people who are now protected against unwanted pregnancies to avoid consulting responsible physicians and clinics, and will thereby result in increasing the proportion of unwanted and out-of-wedlock births occurring among the adolescent population. Torres, "Does Your Mother Know . . . ?" 10 Family Planning Perspectives 280 (1978); Tietze, "Teenage Pregnancies: Looking Ahead to 1984," 10 Family Planning Perspectives 205 (1978); Pearson, "Social and

Psychological Aspects of Extra-Marital First Conceptions," 5 J. Biosoc. Sci. 453 (1973). The same kind of refusal to seek effective and reputable help has even more dire consequences with respect to the already pregnant young woman.

Some pregnant minors may not wish to inform their parents of their condition out of a genuine desire not to upset them. An appreciable number of minors may fear the prospect of openly hostile or violent parental reactions. One father, upon learning of his daughter's pregnancy said:

> "I didn't know whether I could have killed her or just died myself . . . I could have killed him". Furstenberg, *supra,* p. 55.

The record in this very case offers additional proof of the detrimental impact a requirement of parental notification or consent may have on the interests of the minor. Mary Moe explained that she wished to avoid parental involvement because she feared the physical harm her father might inflict on her and her boyfriend. See also for examples of other apprehensions of harm *In re Diane,* 318 A. 2d 629 (Del. 1974), and *In re Smith,* 16 Md. App. 209, 295 A. 2d 238 (1972).

The Massachusetts statute as construed by the Supreme Judicial Court of Massachusetts presents an alarming prospect to a minor who finds herself forced into the ordeal of confronting unsupportive parents. The defendants' own expert, Dr. Sprague Hazard, testified that, in those situations where a minor's parents are unalterably opposed to an abortion, a court proceeding might cause severe psychological trauma. 2 App. 422.

Faced with such a statutory scheme, a minor may resort to running away, attempting suicide or even trying to

abort herself. Semmens and Lamers, *Teenage Pregnancy* (Thomas, 1968), pp. 14-21. She may also try to obtain an illegal abortion, perhaps from an unlicensed practitioner, despite the fact that such abortions present increased risks of major complications and death. See Kahan *et al.,* "The Effect of Legalized Abortion on Morbidity Resulting From Criminal Abortion", 121 Am. J. Obst. & Gyn. 114 (1975).

A 1972 study of suicide attempters admitted to Los Angeles County, University of Southern California Medical Center found that 75% of suicide attempters are female, their average age sixteen. Teicher, "A Solution to the Chronic Problem of Living: *Adolescent Attempted Suicide"* in Current Issues in Adolescent Psychiatry (Brunner-Mazel 1973), p. 131. After interviewing all of these teenagers Dr. Teicher found 22% of the girls were pregnant or believed themselves to be pregnant when they attempted suicide. In contrast, *none* of the girls in a control group of teenagers who did not attempt suicide during that period were or believed themselves to be pregnant. *Ibid.* at 136. Dr. Teicher's study identified unplanned pregnancy as a primary cause of suicide attempts among young women.

Moreover, where, as here, the appointment of counsel for the child is discretionary, a substantial constitutional issue is raised regarding the fairness of the proceedings. One court recognized the minor's clearly disadvantaged position in cases where she does not have her own counsel and the court chooses not to assign counsel to her. "Certainly she cannot be expected to litigate a question as emotionally charged as that contemplated by the statute—child vs. parent—without the guiding hand of counsel", *Wynn* v. *Scott,* 448 F. Supp. 997, 1004 (N.D. Ill. 1978), *aff'd Wynn* v. *Carey,* No. 78-1262 (7th Cir. August 17, 1978).

The Massachusetts statute challenged in this case gives the minor no quarter. Despite this Court's statement in *Danforth, supra,* that the mature minor has the right to make the abortion decision in consultation with her physician, the statute denies her that right and vests it instead in her parents and the court. Again, if the minor is immature, the statute forces her to involve her parents despite this Court's statement that in some cases a court should have the right to decide what is in her best interests "without parental consultation". In other words, the Massachusetts statute requires *parental involvement* in every case where a minor seeks an abortion regardless of the maturity of the minor and the nature and character of the parents (e.g., a father of a minor who himself caused the pregnancy). The statute as thus construed by the Supreme Judicial Court of Massachusetts, is, for these reasons, clearly unconstitutional.

POINT II

The Massachusetts statute is an unconstitutional violation of minors' rights to decide, with their physicians, to have an abortion.

This Court ruled in *Roe* v. *Wade* that "the abortion decision in all its aspects is inherently and primarily a medical decision and basic responsibility for it must rest with the physician". 410 U.S. at 166. The Massachusetts statute attempts to transfer that responsibility with respect to unmarried minors (regardless of their degree of maturity) to parents and courts, severely limiting the role and discretion of physicians. *Amici* believe that this is an unreasonable interference with the physician's professional judgment and discretion as well as the minor's right of privacy.

When parents are not supportive, the pregnant minor's counseling needs can best be met by sympathetic professionals:

> "The tendency of a minor's pregnancy to polarize the family automatically limits the ability of parents to counsel their children effectively. In many cases, the initial unwillingness of the minor to inform her parents of her pregnancy may indicate a fundamental conflict between the parents' and the child's views on sexual activity, pregnancy and abortion. In this context, parental advice cannot be expected to be dispassionate, supportive and effective."

Note, "The Minor's Right of Privacy: Limitations on State Action After *Danforth* and *Carey*", 77 Col. L. Rev. 1216, 1239 (1977); see also Shouse, "Psychological and Emotional Problems of Pregnancy in Teenage Adolescence", in Zackler and Brandtadt, eds., *The Teenage Pregnant Girl* (Thomas 1975), pp. 161-168.

The unreasonable and arbitrary character of the statute's requirement that parents be involved *in every case* in which a minor seeks an abortion is not affected by the Attorney General's quotation from Blackstone that Providence his implanted "in the heart of every parent that natural or insuperable degree of affection" which neither the individual parent's depravity nor rebellious children can totally extinguish. Appellants' Brief 30. That adage lacks force at a time when the Federal government estimates that one in every five children in the United States is abused. (N.Y. Times, Dec. 23, 1978, "New X-Ray System Can Detect Child Abuse Cases, Expert Says.") Nor is it reassuring to be told that a requirement of parental consultation is "beneficent both in social purpose and in the great majority of applications . . ." Appellants' Brief 31.

The law already assures that every pregnant girl will have the guidance of her physician in making the abortion decision. Obviously these physicians can and will encourage parental involvement in those cases where they believe it will be in the girl's best interests. If a state were concerned that the advice provided by physicians might be insufficient, it could require that the girl obtain additional consultation and advice from another supportive adult—either a parent, an approved counselor, or a mature person with a continuing supportive relation with the girl. This is emphatically not what Massachusetts has done. Rather, it demands parental consultation in every case, whatever the nature of the relationship between parent and child. The statute has no impact on those families in which there is already a relationship of communication and trust. It has no impact in those situations in which the minor will involve her parent because her physician has, on the basis of his or her best judgment, insisted that she do so. The statute impacts only in those situations in which neither the girl nor her physician would seek to involve the parents, except for the command of the state. When the relationship between parent and child is distant or destructive, or when the parent opposes abortion for reasons unrelated to the girl's best interests, the result is to force her to bear an unwanted child or to seek services outside the law.

Although the emotional support of understanding parents may well be desirable, few parents are in fact able to provide information which will actually bear upon the decision the minor may reach in consultation with a physician or other helping adults. Indeed, the evidence clearly suggests that there is a substantial correlation between parental ignorance or reluctance to discuss contraception and

a teenage daughter's subsequent misinformation and inability to approach her parents on such matters as unwanted teenage pregnancy. Baudry & Wiener, "The Pregnant Patient in Conflict About Abortion: A Challenge for the Obstetrician", 119 Am. J. Obst. & Gyn. 705 (1974); Zelnik and Kantner, "Sexual Contraceptive Experience of Young Unmarried Women in the United States: 1976 and 1971", 9 Family Planning Perspectives 55 (1977); Zelnik and Kantner, "First Pregnancies to Women Ages 15-19: 1976 and 1971", 10 Family Planning Perspectives 11 (1978); Zelnik and Kantner, "Contraceptive Patterns and Premarital Pregnancy Among Women Aged 15-19 in 1976", 10 Family Planning Perspectives 135 (1978).

As one commentator has noted:

> "Even if a minor is unable to understand fully the broad consequences of an abortion, parental input may do little to increase her comprehension. Certainly parents can seldom supplement the attending physician's explanation of the medical risks of abortion and may, in fact, seriously distort the dangers inherent in the procedure."

Note, "The Minor's Right of Privacy: Limitations on State Action After *Danforth* and *Carey*", 77 Col. L. Rev. 1216, 1238 (1977).

Not only may parents lack medical information but their advice may well be purely subjective and reflective of strong personal convictions of their own concerning abortion rather than any objective judgment as to the minor's best interests. This Court has recognized that a person's position on the abortion issue is affected by numerous considerations:

"One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusion about abortion."

Roe v. *Wade,* 410 U.S. 113, 116 (1973)

A requirement of parental involvement frequently creates nothing more than an emotionally charged forum for divergent views on the abortion issue, and is not likely to provide to the minor the guidance she needs in order to make a well reasoned decision.

"Those who insist on parental consent are concerned less with the child's well being than with strengthening their general opposition to abortion, which they cloak in the magical notion that law can improve family communications by compelling a young women in trouble to consult with her parents when such family trust does not exist."

Goldstein, "Medical Care for the Child at Risk: On State Supervention of Parental Autonomy," 86 Yale L.J. 645, 662 (1977).

Physicians who specialize in adolescent health care have long recognized the importance of a confidential relationship between the doctor and his adolescent patient. Adolescents "have reached the stage of development where they can profit from, and they badly need, the benefits which a confidential relationship with a doctor of their own afford them". J. Roswell Gallagher, M.D., "The Care of Adolescents", in *Medical Care of the Adolescent* p. 64 (3d ed. Appleton-Century-Crofts, New York 1977). "More adolescents than ever are away from home, and there is a rising incidence of medical problems such as venereal disease, pregnancy, and drug abuse, often the result of behavior at odds with parental wishes. The doctor has come to stand square center in the debate when youths in these or similar circumstances seek confidential medical care on their own consent". Adele Hofmann, M.D., "Consent and Confidentiality and Their Legal and Ethical Implications for Adolescent Medicine", in *Medical Care of the Adolescent* p. 42 (3d ed. Appleton-Century-Crofts, New York 1977).

Physicians may be the only persons who can provide precisely the sort of patient understanding that the pregnant minor needs and may be unable to obtain at home. Dauber, *et al.,* "Abortion Counseling and Behavioral Change", 4 Family Planning Perspectives 23 (1972). The trained health professional is in an excellent position to perceive both the pregnant minor's needs for medical assistance and for counseling. Baudry & Wiener, "The Pregnant Patient in Conflict About Abortion: A Challenge for the Obstetrician", 119 Am. J. Obst. & Gyn. 705 (1974).

Some youngsters can be ably assisted by physicians and other health personnel to solicit and gain parental involvement. Others in the absence of parental support require help in identifying "significant others", be they responsible relatives, friends or social and welfare agencies to whom they can turn for the emotional support they need. (Moreover, to prevent a subsequent unwanted pregnancy, a teenager needs assistance in discovering the dynamic etiology of the preceding one, as well as advice on contraceptive methods. Tietze, "Repeat Abortions—Why More?" 10 Family Planning Perspectives 286 (1978).)

Appellants argue that unless parental consultation is mandated, many teenagers will not receive essential coun-

seling. But a requirement of parental consultation and consent is not the only way, and indeed is often not a good way to ensure that counseling is received. Other and better alternatives are usually available, such as state-approved counseling services or a requirement that clinics offering abortion services make counseling available.

> "This kind of State action largely avoids the constitutional deficiencies of parental consultation and notice provisions. It leaves the mature minor free to make fundamental decisions without parental or judicial interference while providing the less mature child with the type of support and counseling reasonably capable of alerting her to the general risks involved in such decisions."

Note, "The Minor's Right of Privacy: Limitations on State Action after *Danforth* and *Carey*", 77 Col. L. Rev. 1216, 1241 (1977).

Professional counseling services are important not only in making a decision about whether to terminate a pregnancy, but afterward as well, regardless of whether the teenager has an abortion or carries to term. "(C)onsiderably more emphasis has been given to the psychological effects of abortion than to the psychological effects of carrying through an out-of-wedlock pregnancy and either keeping the baby or giving it up for adoption . . . (M)any females . . . persist in mourning the child whom they have given up for adoption, wishing that they had kept the child and wondering what he or she is like". Osofsky and Osofsky, "Teenage Pregnancy: Psychosocial Considerations" in 21 Clinical Obstetrics and Gynecology, No. 4, p. 1166 (Harper & Row Medical Dep't, December 1978).

Studies have also documented the severe burden placed on adolescents who choose to keep their babies. Having responsibility for a child, frequently without the help of a husband or father, curtails the educational and occupational attainments of these young women and leads to a greater degree of welfare dependency and need for medical and other public assistance. Hardy, Welcher, Stanley & Dallas, "Long Range Outcome of Adolescent Pregnancy" in 21 Clinical Obstetrics & Gynecology, No. 4, p. 1230 (Harper & Row Medical Dep't, December 1978); Card and Wise, "Teenage Mothers and Teenage Fathers: The Impact of Early Childbearing on the Parents' Personal and Professional Lives," 10 Family Planning Perspectives 199 (1978). A recent study shows that in 1975, the government disbursed $9.4 billion to households through AFDC (Aid to Families with Dependent Children). Of this total, about half, $4.65 billion, was paid to households containing women who had borne their first child while still teenagers. Moore, "Teenage Childbirth and Welfare Dependency," 10 Family Planning Perspectives 233, 234 (1978).

All of these complex factors point to the need for professional guidance in this sensitive area. The approach of the Massachusetts statute is simplistic and overbroad, and would destroy for many young women the confidential relationship with physicians and other professionally trained counselors which they desperately need.

The appellants have cited the model statute governing the ability of minors to consent to health care adopted by the American Academy of Pediatrics. 51 Pediatrics 293, cited in Appellants' Brief at p. 16. It is noteworthy that the model act, which excludes abortion from its coverage, was published in February, 1973, and adopted before this Court invalidated the statutes then in effect in most states

which made many abortions criminal. In a subsequent report of the Committee on Youth of the American Academy of Pediatrics (chaired by Dr. Sprague Hazard, appellants' expert), that Committee recognized that "(c)ontacting the family in the absence of a youth's permission to do so may risk losing the patient to care and enhance the likelihood that he will not seek it under similar circumstances in the future. There may also be an effect on other youths in the community who will come to perceive that the promises of confidentiality are not inviolate". "The Implications of Minor's Consent Legislation for Adolescent Health Care: A Commentary", 54 Pediatrics 481 (October 1974). In its report (which was reviewed and approved by the Academy's Council on Child Health) the Committee on Youth said:

> "The adolescent needs to be provided certain medical care on his own consent, if this is the only manner under which he will accept it; but, it is of prime importance that a concerted, but noncoercive, effort be made to assist the still dependent and immature teenaged patient to ultimately agree to involve parents to obtain the benefit of their support and guidance. Minors' consent laws* not only provide for remediation of a medical need, but they also foster a situation wherein a concerned and caring professional may well serve as an intermediary in restoring interrupted intrafamily communication and unity, which could not have come about otherwise."

Although the American Academy of Pediatrics has not focused its attention on the specific issue of abortion since this Court in 1973 recognized it as a fundamental right,

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* Meaning laws that enable minors to consent for their own medical care.

other groups have done so. The American Academy of Child Psychiatry, composed of 2,000 child psychiatrists and the Society for Adolescent Medicine, have joined the other *amici* in filing this brief.

Attached as Appendix A is a position statement adopted by the American Academy of Child Psychiatry in October, 1977. The position statement, adopted in connection with the issue of Medicaid funding for abortion, sets forth the problems attendant upon adolescent pregnancy and childbearing and concludes that these problems tend to pass from generation to generation, perpetuating "a cycle of social and educational failure, mental and physical illness, and serious delinquency". The position statement asserts "that the freedom to act to interrupt this cycle must be considered a mental health imperative with major social implications".

POINT III

Since compliance with the statute will needlessly postpone the termination of many pregnancies, thus substantially increasing health hazards to the pregnant minor, the Massachusetts statute also violates the 14th Amendment on this ground.

Once a pregnant woman, in consultation with her physician, decides to terminate a pregnancy, it is essential that she obtain that operation as soon as possible. By delaying every pregnancy termination pending parental consent or judicial action, the Massachusetts statute increases the health risks a minor woman faces. Institute of Health, *Legalized Abortion and the Public Health* (Nat. Acad. Sci. 1975) 47-48.

The safest time to terminate a pregnancy is during the first trimester, preferably by the eighth week. "'The Earlier the Safer' Applies to All Abortions", 10 Family Planning Perspectives 243 (1978). The risks a woman desiring an abortion faces during this period, as during the entire duration of her pregnancy, are a function of her gestation period. The risks of an abortion procedure increase after the eighth week. Thus, the total morbidity* risk a woman faces increases from 4.55 per 100 abortions at the eighth week to 5.47 per 100 by the twelfth week. This means that each week a woman delays obtaining an abortion increases the risks she will face and that by the 12th week these risks will have risen by 20% beyond what they were at the eighth week. Cates, *et al.*, "The Effect of Delay and Method Choice on the Risk of Abortion Morbidity", 9 Family Planning Perspectives 266 (1977).

More important, however, is the major morbidity risk (i.e. the risk of major complication). While the major morbidity risk stands at .23 per 100 abortions at the eighth week of pregnancy, it has increased by 57% at the 10th week and by the 12th week is .44 per 100, representing an increase of 91%. Cates, *ibid.* The delay inherent in requiring a minor to comply with the Massachusetts statute, presumably predicated on a desire to improve the quality of the minor's decision will, especially when the minor comes from a hostile family situation, only increase the risk to which she will be exposed if she finally does obtain an abortion. Each additional condition imposed on the decision of a minor and her physician to terminate a pregnancy actually increases the health hazard the woman must face. *Wynn* v. *Carey,* No. 78-1262 (7th Cir. August 17, 1978) slip opinion pp. 22-23.

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* The term "total morbidity" denotes the possible complications, major and minor, attending an abortion.

The operation of the Massachusetts statute may push the actual termination of a pregnancy into the second trimester. The methods available after the first trimester—dilation and evacuation, saline instillation and prostaglandin instillation—are each significantly more hazardous than the method of suction and curettage available in the first trimester. By the time she reaches the 16th week of her pregnancy, the minor faces health risks from three to thirteen times as great as those she faced at the eighth week. Cates, *ibid.;* Grimes *et al.*, "Methods of Midtrimester Abortion: Which Is Safest?" 15 Int'l J. Gyn. & Obst. 184 (1977).

Despite the fact that by the second trimester the morbidity risk is quite high, it does not yet approach the risk a minor faces should she decide to carry the child to term. Cates and Tietze, "Standardized Mortality Rates Associated with Legal Abortion: United States 1972-1975", 10 Family Planning Perspectives 109 (1978).

Concern for the minor's well being is woefully inconsistent with a rule which in application can only further endanger her health. Forcing a woman to postpone a decision to terminate her pregnancy subjects her to unnecessarily increased medical risks and the costs associated with treating complications that do arise. Von Allmen, *et al.*, "Costs of Treating Abortion-related Complications," 9 Family Planning Perspectives 273 (1977). As one court put it:

> "The class of minor women plaintiffs seek to exercise a constitutional right which, with each passing day, becomes physically more difficult and dangerous, to the end that their constitutionally guaranteed decision to terminate their pregnancy may be totally frustrated

if they are prevented from acting with dispatch." *Wynn* v. *Scott,* 448 F. Supp. 997, 1004 (D. Ill. 1978), *aff'd, Wynn* v. *Carey,* No. 78-1262 (7th Cir. August 17, 1978).

While the Massachusetts Supreme Judicial Court has indicated that all such court proceedings will be handled expeditiously, *amici* submit that the statutory scheme is bound to cause harmful delays. Two factors are likely to lead to delay: the minor's reluctance to involve her parents from the outset and the passage of time inherent in judicial proceedings. As we have shown, fear of intra-familial strife will often delay a minor's decision to approach her parents with her problem and may in fact compel her to seek alternative, dangerous methods of coping with her unwanted pregnancy. It is already well established that a minor, because of her ignorance or embarrassment about her possible pregnancy or even because of her refusal to acknowledge such a possibility, will almost invariably delay seeking medical assistance until relatively late in the gestation period. In fact, only about 30% of pregnant minors seek aid before the eighth week and the majority wait until the 10th week or even later. Fielding *et al.,* "Comparison of Women Seeking Early and Late Abortion", 131 Am. J. Obst. & Gyn. 304 (1978); Bracken and Kasl, "Psychosocial Correlates of Delayed Decisions to Abort", 4 Health Ed. Monographs 1 (1976).

While the teenager's unfamiliarity with her own reproductive cycle contributes to her failure to recognize and act on her pregnancy (Mallory, *et al.,* "Factors Responsible for Delay in Obtaining Interruption of Pregnancy", 40 Obst. & Gyn. 556 (1972)), she will also be influenced by attitudes she encounters among friends, relatives and her

family. All these factors contribute to her psychological trauma in such a way that she is unable to perceive the dimensions of her problem and the need to seek out immediate medical assistance. Bracken and Swigar, "Factors Associated with Delay in Seeking Abortion", 113 Am. J. Obst. & Gyn. 301 (1972). As a result of her failure to obtain timely medical assistance, the pregnant teenager exposes herself to a greater risk of complication if she decides to have an abortion. By avoiding or delaying her decision to obtain such assistance, she may also lose the opportunity to obtain the early prenatal care which is invaluable to her own health and to the health of her child should she carry the pregnancy to term. Berger, "Abortions in America: The Effects of Restrictive Funding", 298 N. Eng. J. Med. 1474 (1978).

The structure and organization of the Massachusetts court system and the procedures suggested by the state court are bound to cause further delay. There is no statutory provision for expediting such proceedings or for ensuring that any appellate review will be handled quickly. Once provision is made for advance parental notification, appointment of counsel for the minor (if the judge deems it necessary), a hearing, a decision and an appeal, the minor may be well beyond a point in time when abortion is a possible course of action.

The final and most cruel irony of the statute, as interpreted by the Massachusetts court, is that the judge could very well decide that, even though the minor is sufficiently mature to give informed consent, the delays caused by the court procedure itself have themselves made the desired abortion not in the minor's best interests.

Even if this does not happen, however, a typical proceeding (given the minor's probable lack of counsel or of pro-

cedural expertise) may easily consume a week or two, substantially increasing the health hazards of abortion. *Amici* submit that this is an "undue burden", seriously interfering with the doctor-patient relationship, and that it is not justified by any "significant state interest" because the adversary proceeding is unlikely to improve either the quality of the minor's decision or her relationship with her family.

POINT IV

The Massachusetts statute denies the equal protection of the laws to those minors who choose to terminate their pregnancies as opposed to those minors who choose to carry their pregnancies to term.

Massachusetts has no law requiring parental consent or even parental consultation for medical services for a minor who chooses to carry her pregnancy to term. Indeed Massachusetts law gives mature minors the right to consent for medical services in general, and a 1975 Massachusetts statute enables any minor (mature or not) who is pregnant or believes herself to be pregnant to give consent to medical care without any parental involvement at all. Mass. Gen. Laws ch. 112, § 12F, as added by Mass. Stat. 1975, ch. 564. That statute excludes only abortion and sterilization (which is not involved in this case and which differs significantly from other medical procedures because it is intended to and usually does cut off permanently the patient's ability to have children).

It appears to be generally conceded and indeed it has been held that a parent may not force a minor child to have an abortion. *In re Smith*, 16 Md. App. 209, 295 A. 2d 23 (1972). By the same token, it is inconsistent with any

right of privacy a minor may have for a parent or parents to have a right to compel their minor child to have a child she does not want and for whom she probably cannot provide the care and nurture that an infant requires. This Court has, of course, held in *Danforth* and in *Carey* v. *Population Services International*, 431 U.S. 678 (1977), that minors do have a constitutional right of privacy in connection with childbearing. The Massachusetts statute demands parental consent or notification for abortion and not for the decision to carry a pregnancy to term notwithstanding the fact that childbirth, especially for minors, is many times more dangerous in terms of morbidity and mortality than abortion.

The evidence before the Court in *Roe* v. *Wade* was that "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." 410 U.S. 113, 149. During the 1970's maternal mortality rates have decreased, and as legal abortions have been more widely available the risks of abortion have decreased dramatically. The situation is now one in which for white women the risk of death from childbirth (9.5 per 100,000) is almost *twenty times* as great as the risk of death from legal abortion (0.5 per 100,000). For black women the risk of death from childbirth is 3½ times that for white women (32.7 per 100,000); it is also over thirteen times as great as their fivefold risk of death from legal abortion (2.4 per 100,000). Cates *et al.*, *Legal Abortion: Are American Black Women Healthier Because of It?*, DHEW, Pub. Health Serv., CDC, 1976. See also Petitti *et al.*, *Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age*, DHEW, CDC, 1977, pp. 3-4.

As dramatic as these figures are, they understate the extent to which teenagers are injured when the state creates obstacles which prevent them from obtaining abortions which they seek. The comparisons assume that minors who are unable to obtain legal abortions will continue their pregnancies rather than seek illegal or self abortions which threaten substantially greater risks to their life and health. The comparisons are based on mortality rates for all childbirth, wanted and unwanted. Where pregnancy is unsought and unwanted, it creates significantly greater risks to the women. Finally the comparative figures are surely understated because they include all women, while the women affected by the Massachusetts law are teenagers. The risks of childbirth are significantly greater for teenagers than for adults,* but there is no evidence that the risks of abortion are any greater for teenagers than for other women.

Surely, if parental involvement is not required before a minor can obtain medical services in the more hazardous situation of carrying a pregnancy to term, it cannot be required for the less hazardous procedure of abortion. The State has suggested no reason why pregnant minors are less capable of deciding whether to terminate their pregnancy than they are to decide whether to carry their pregnancy to term, or even to have a Caesarian section, a far more dangerous procedure than a first trimester abor-

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* Teenagers are significantly more likely to suffer the ultimate biological risk—death—than older pregnant women. Fatal complications late in pregnancy are 60% more likely for a girl under 15 than for a woman 20-24 and 13% more likely between the ages of 15 and 19. Alan Guttmacher Institute, *11 Million Teenagers*, 1976, pp. 22-23. 1974 vital statistics show that girls 15-19 years old are twice as likely to suffer fatal complications as the result of hemorrhage, spontaneous abortion or toxemia as women 20-24. Under 15 they are 3.5 times more likely to die of toxemia. *Id.* at pp. 21, 62.

(footnote continued on following page)

tion. *Wynn* v. *Carey*, No. 78-1262 (7th Cir. August 17, 1978) slip opinion p. 20. The failure to require parental consent for carying a pregnancy to term underlies the unreasonableness of requiring such consent to terminate that pregnancy.

This Court's decisions in *Maher* v. *Roe*, 432 U.S. 464 (1977) and *Beal* v. *Doe*, 432 U.S. 438 (1977) are not to the contrary. Those cases held that the state may by public funding "favor childbirth over abortion". Such funding, this Court said in *Maher*, "places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion". This Court further pointed out that "Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader". *Maher* v. *Roe*, 432 U.S. at 476.

Massachusetts Gen. Laws ch. 112, § 12 S makes it a criminal offense to perform an abortion upon a minor without parental consent or notification although a physician is specifically authorized by Massachusetts law to render medical services without parental consent or notification to a pregnant minor who chooses to carry her pregnancy to term. For this further reason, the Massachusetts statute must fall.

The risks of severe, but not-fatal complications of pregnancy, many of which permanently impair the young woman's future life, health and reproductive capacity, are also significantly higher for teenagers. DHEW reports that "studies show pregnant adolescents have higher rates of toxemia, prolonged labor, premature delivery, pelvic disproportion and Caesarean section than more mature women." D-HEW, *Approaches to Adolescent Health Care*, 1975, p. 17. Girls continue growing for an average of five years after the onset of menses, which, in the United States, occurs at an average age of 12.8. D-HEW, Office of Child Health Affairs, *Teenage Pregnancy*, 1976, p. 5. Teenage pregnancy appears to stop the crucial process of physical growth although this impact is at present "poorly understood." *Ibid.*

CONCLUSION

For the reasons stated in this brief and in the briefs of the appellees, *amici* respectfully urge that this Court affirm the judgment of the three-judge court below.*

Respectfully submitted,

EVE W. PAUL
c/o Planned Parenthood Federation of America, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

HARRIET F. PILPEL
437 Madison Avenue
New York, New York 10022
(212) 758-4010

Attorneys for Amici Curiae

Of Counsel:

SYLVIA A. LAW
40 Washington Square South
New York, New York 10012

GREENBAUM, WOLFF & ERNST
437 Madison Avenue
New York, New York 10022

January 8, 1979

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* *Amici* wish to acknowledge the assistance of Giles Scofield, a third year law student at New York University School of Law, in the research for this brief.

APPENDIX A

TWENTY FOURTH ANNUAL MEETING OCTOBER 19-23, 1977
AMERICAN ACADEMY OF CHILD PSYCHIATRY
SUITE 904, 1800 R STREET, N.W.
WASHINGTON, D.C. 20009
(202) 462-3754

HOUSTON, TEXAS, OCTOBER, 1977

The American Academy of Child Psychiatry is aware of the national debate concerning the funding of abortion by the Medicaid system. The Academy wishes to declare that there is now a body of scientific data which confirms:

1) that the young adolescent most vulnerable to early pregnancy is the product of adverse sociocultural conditions involving poverty, discrimination, family disorganization and the like,

2) that the resulting pregnancy is statistically laden with medical complications that threaten the well being of both mother and fetus,

3) that the delivery that ensues is prone to prematurity and major threats to the health of both mother and child,

4) that the resulting newborns have a higher percentage of birth defects, developmental difficulties and a poorer life and health expectancy than the average for our society,

5) that such children are often not given up for adoption and eventually get caught in the web of the foster care and welfare systems where they enter a lifetime of dependency and expensive social interventions,

6) that these children are often unwanted and in a short time become prone to abuse, neglect, failure to thrive, and serious medical illness,

7) that the tendency of this pattern to pass from generation to generation is very marked and thus serves to perpetuate a cycle of social and educational failure, mental and physical illness, and serious delinquency and

8) that the freedom to act to interrupt this cycle must be considered a mental health imperative with major social implications.

As a result of these data, it is urgently recommended that elective abortion for teenage pregnancy be adequately funded within the Medicaid System.

Supreme Court, U. S.
FILED
NOV 24 1978
MICHAEL RODAK, JR., CLERK

JAN - 5 PAGE 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI,
Attorney General of the
Commonwealth of Massachusetts, Et al.,
Appellants

v.

WILLIAM BAIRD, Et Al.,
Appellees

No. 78-330

JANE HUNERWADEL, Etc., Appellant

v.

WILLIAM BAIRD, Et Al.,

On Appeal From The United States District Court
For The District Of Massachusetts

MOTION FOR APPOINTMENT OF ALAN ERNEST AS COUNSEL
OR GUARDIAN AD LITEM FOR UNBORN CHILDREN

Alan Ernest
5713 Harwich Ct. #232
Alexandria, Va 22311

Counsel

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MOTION FOR APPOINTMENT OF ALAN ERNEST AS COUNSEL OR GUARDIAN AD LITEM FOR UNBORN CHILDREN

The Court is moved to appoint Alan Ernest as counsel, or guardian ad litem, to represent the unborn children in this case.

Alan Ernest is a lawyer in the District of Columbia, and a member of the bar of this Court. His interest is to defend the constitutional rights of the unborn.

Counsel for the unborn will present legal matter to the Court, not presented by any of the parties, to establish the unborn's constitutionally protected right to life. This new evidence is outlined in the attached brief in support of the motion.

The counsel alleges that Roe v Wade, 410 US 113 (1973) is based on false evidence and millions of lives have been unconstitutionally exterminated. If Roe v Wade were overruled, it would obviously be dispositive of this case.

The attached brief, infra pages 6-11, indicates that the procedure of deciding the right to life of the unborn, after refusing to allow counsel to represent the unborn, and present evidence on their behalf, would appear sufficient in itself to permit a jury to convict Supreme Court Justices of criminal extermination.

WHEREFORE, the Court is moved to appoint Alan Ernest as counsel, or guardian ad litem for the unborn, so that counsel can submit briefs, appear at argument, cross examine the foundation of Roe v Wade and present evidence on behalf of the unborn to establish the unborn's constitutional right to life.

Alan Ernest
Counsel

BRIEF

For the 21 st time, the Supreme Court is petitioned to overrule Roe v Wade, 410 US 113(1973) on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated.

Can it be pretended that it is any longer the government of the United States,- any government of Constitution and laws,- wherein a Tribunal holding office for life, and asserting to be the ultimate arbiter, conducts proceedings to condemn millions of victims to death; fabricates evidence to make the exterminations appear legal; refuses to allow its evidence to be cross-examined; refuses to appoint counsel to defend the victims; refuses to allow evidence to be presented on behalf of the victims, even evidence showing that the victims are being unconstitutionally exterminated by false evidence?

SUMMARY OF ARGUMENT

1. The Supreme Court is petitioned to overrule Roe v Wade, 410 US 113(1973) on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated. See PART I, infra pages 2-6.

2. It is also alleged that, independent of the evidence in Roe v Wade, the procedures used by the Supreme Court to effect the Roe v Wade killings so palpably violate due process of law as to leave no question that the exterminations are unconstitutional. See PART II, infra pages 6-9.

3. It is further alleged that the Roe v Wade killings violate federal criminal statutes. The Supreme Court of the United States is charged with criminal falsehood and criminal extermination. See PART III, infra pages 9-11.

ARGUMENT

PART I

ROE v WADE IS BASED ON FALSE EVIDENCE

It is alleged that Roe v Wade, 410 US 113(1973) is based on false evidence and millions of lives have been unconstitutionally exterminated: Roe v Wade must be overruled. An EXHIBIT A, outlined below, has been repeatedly submitted to the Court to prove this charge.

EXHIBIT A was succinctly outlined in counsel's 16th petition to overrule Roe v Wade (Unborn Child Roe v John J. Sirica, Judge, United States District Court for the District of Columbia, (78)A-215):

"1. even the Supreme Court admitted in Roe v. Wade that if the unborn were 'a "person" within the language and meaning of the Fourteenth Amendment' then the case for abortion for convenience 'of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment,' and

"2. the express, universal terms of the Fourteenth Amendment ('nor shall any State deprive any person of life . . . without due process of law') on their face, protect the lives of the unborn, as everyone else, and

"3. the holdings of Chief Justice John Marshall (that can be traced through the Constitution, The Federalist Papers, and The Federal Convention of 1787) show that the Supreme Court had no lawful authority to construe an exception to express, universal terms (such as 'any person') unless the Court could prove the exception to the express, universal terms beyond a reasonable doubt, and show that 'had this particular case been suggested' to the framers the 'language would have been so varied, as to exclude it,' and

"4. the Supreme Court presented false evidence to support its conclusion in Roe v Wade that 'the word "person," as used in the Fourteenth Amendment, does not include the unborn,' and but for the false evidence, there is not even a credible foundation, much less a compelling one, for denying the protection of the express, universal terms 'any person' to the lives of the unborn, and

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Summary of False Evidence

In introduction, at the time the Fourteenth Amendment was adopted in 1868, most states had already enacted positive statutes that made abortion a crime unless it were necessary to save the life of the mother. Within a few years, these criminal abortion statutes were virtually universal.

Consequently, any theory of a constitutional right to abortion on demand faced an impossible contradiction: How is it possible that the people who adopted the Fourteenth Amendment had enacted positive criminal statutes to protect unborn life, and at the same time, without a single word of explanation, intended to imply an exception to the express, universal terms that not "any person" can be deprived of life without due process of law, and to create a constitutional right to abortion on demand?

To resolve that fatal contradiction, the Court asserted the hypothesis that when the criminal abortion laws were first enacted, the laws were not intended to protect unborn life, but rather were only intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

(A.) The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v Wade, 35 L Ed 2d at 174. This was asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and Lloyd, A Hundred

Years of Medicine 19(1943). But this book merely described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The reference did not even mention the abortion operation.

However, the 19th century obstetric authorities throughout the Western World prove the Court's assertion of fact to be false. These 19th century obstetric authorities, based on their own experience in performing abortions, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96(1802)(English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530(4th American ed. 1852)(French physician); or "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293(1864)(American physician). In short, the obstetric authorities prove the Supreme Court's assertion of fact to be false.

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus" to "come on," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, 99. One 19th century physician traced this operation back almost 2000 years.

(B.) The Supreme Court next asserted, "Abortion mortality was high." Roe v Wade, 35 L Ed 2d at 174. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high" without any authority to support it. It is a naked assertion. The 19th century obstetric authorities also prove this assertion of fact to be false.

(C.) Upon the two false assertions of fact, the Supreme Court infers that "a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v Wade, 35 L Ed 2d at 174.

(D.) From the inference that the criminal abortion laws were not intended to protect the unborn, the Court further inferred that, likewise, the framers of the Fourteenth Amendment did not intend it to protect the lives of the unborn, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v Wade, 35 L Ed 2d at 180. This conclusion rests entirely on inference.

This pyramid of inference is shown to rest on assertions of fact that are false.

Moreover, as independent corroboration of the purpose of the criminal abortion statutes to protect the unborn, 19th century authorities in criminal law, e.g., 2 Archbold, Archbold's Criminal Procedure, Pleading and Evidence 295(6th ed 1853); medical jurisprudence, e.g., F. Wharton and M. Stille, M.D., A Treatise on Medical Jurisprudence 339, 927(2d ed. 1860); medicine, e.g., 13 Transactions of the American Medical Association 56-58 (1860); as well as state supreme courts, e.g., State v Moore, 25 Iowa 128, 135-136(1868), did expressly affirm that these criminal abortion statutes were intended to protect the lives of the unborn.

Consequently, not only is the Supreme Court's inference about the purpose of the 19th century abortion laws shown to rest on false assertions of fact, but there is no other evidence to come to the rescue and save the Court's conclusion. The 19th century authorities prove the very contrary.

In Summary, the Supreme Court bore the burden of proving beyond a reasonable doubt that the express, universal terms of the Fourteenth Amendment,

"any person," did not include the unborn. Yet, the Supreme Court did not cite one 19th century authority that expressly affirmed that the unborn were not persons within the language and meaning of the Fourteenth Amendment, or that there was a constitutional right to abortion on demand; and the Court's conclusion that the 19th century abortion laws were not intended to protect the unborn is shown to rest on false evidence. To the contrary, the 19th century authorities demonstrate that the people who adopted the Fourteenth Amendment not only intended to protect the lives of the unborn, but had already enacted criminal abortion statutes to do so in fact.

"5. the truthful history corroborates that the express, universal terms 'any person' include the unborn, as they do all categories of persons, and more certainly than many groups. The Supreme Court included corporations and aliens as a 'person' within the language and meaning of the Fourteenth Amendment merely on the strength of the express, universal terms 'any person,' without any independent corroborating evidence whatsoever. (The unborn being the only persons ever excluded from the terms 'any person')

"In short, EXHIBIT A shows that the Supreme Court violated the very letter of the Constitution as well as its spirit, and condemned millions of victims to death whom the Constitution endeavors to preserve. . . . . (A)nd there appears to be no defense that will not amount to a claim that the Supreme Court is above the law."

PART II
THE COURT'S PROCEDURES ARE UNCONSTITUTIONAL

Completely independent of the Court's evidence, supra PART I, it is also alleged that the procedures used by the Supreme Court to effect the Roe v Wade killings are in such manifest conflict with due

process of law as to leave no doubt that the killings are unconstitutional.

As counsel's 17th petition to overrule Roe v Wade pointed out (Gaetano v. Earl Silbert, United States Attorney for the District of Columbia, No.78-427):

"The evidence in Roe v Wade aside, the procedures used to effect the Roe v Wade killings alone condemn the killings as illegal. The Nuremberg court, in outlining the case against the Nazi judicial system, noted that many victims were executed after trials which 'did not approach even a semblance of fair trial':

'In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them. . . . They were ... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel.' [citation omitted]

" The U.S. Supreme Court has, in broad form, used these very procedures to effect the Roe v Wade killings. For example, in Roe v Wade, the Court used evidence found by itself, which the parties had not cross examined in a judicial proceeding. The Attorney General of Georgia, a party, requested leave to cross examine the Supreme Court's evidence:

'The Court has taken judicial notice of innumerable facts . . . some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter evidence since they form the foundation of the Court's opinion.' Petition for Rehearing at 4, Doe v Bolton, 35 L Ed 2d 201(1973).

"But the Supreme Court would not allow its evidence to be cross examined by the party. Pet. Rehearing denied, Doe v Bolton, 35 L Ed 2d 694(1973).

"And year after year, the Supreme Court has denied these applications to present evidence on behalf of the unborn victims to show that the unborn are persons whose lives are protected by the U.S. Constitution. This new evidence shows the Supreme Court's evidence to be false; and the Supreme Court will not allow the evidence to be presented.

[For example, in Planned Parenthood of Central Missouri v Danforth, 49 L Ed 2d 788(1976)(the first major abortion case after Roe v Wade) eight lawyers, as counsel or amici, submitted an amicus curiae brief, outlining the evidence in PART I, supra, and alleging that "newly discovered evidence indicates that Roe v Wade rests upon factual errors that require the overruling of that case."

Since the purpose of amicus briefs is to present legal matter to the Court, not presented by the parties, so that the Court will not go wrong on vital national affairs, the Court seldom rejects amicus briefs. Stern and Gressman, Supreme Court Practice 481-82(4th ed 1969). The landmark constitutional decision which applied the Fourth Amendment exclusionary rule to the States was predicated upon argument by amicus curiae, not the parties. Mapp v Ohio, 367 US 643, 646 n.3(1961). And in the Missouri abortion case it was only the amicus brief that presented the newly discovered evidence showing Roe v Wade to be based on false evidence.

But the Supreme Court would not allow this amicus brief to be filed. Motion to file by D.C. Right to Life Committee, et al., denied 46 L Ed 2d 633(1976). After refusing to allow this "newly discovered evidence," showing Roe v Wade to be based on false evidence, to be presented on behalf of the unborn, the Court proceeded to nullify parts of the Missouri abortion statute, and effectively extended the killings in the name of Roe v Wade.]

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"In summary, without counsel representing the victims, it appears that the Supreme Court itself produced evidence to condemn the victims; denied permission to cross examine its evidence; and denied requests to present evidence on behalf of the victims, even evidence showing the Court's evidence to be false. Exterminations pursuant to these procedures cannot be pretended to be lawful."

PART III
THE CASE AGAINST THE SUPREME COURT

Counsel's 8th (Gaetano v Louis Oberdorfer, Judge, United States District Court for the District of Columbia, No. 77- 1358) and each subsequent petition, specified the federal criminal statutes believed violated, and charged the Supreme Court with criminal falsehood and criminal extermination.

The Supreme Court has not denied the charges, much less attempted to prove the charges to be false:

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CONCLUSION

Can it be pretended that it is any longer the government of the United States,- any government of Constitution and laws? As noted in the 18th petition to overrule Roe v Wade(Gaetano v U.S. Court of Appeals for the District of Columbia Circuit, No. 78-428):

"Through Roe v Wade, the Supreme Court has asserted a second method for the government to condemn persons to death:

"The first, set out in the Constitution, is by conviction by an impartial jury for violation of express laws enacted by the people and applicable to all in the state; with right to representation by counsel; with right to be acquitted unless found guilty beyond a reasonable doubt; with provision to stop execution if new evidence is discovered.

"The second, set out in Roe v Wade, is for a Tribunal holding office for life(without assistance of counsel to defend the victims)to rule the victims out of the human race as inferiors, in violation of the very letter and spirit of the Constitution, falsifying evidence to make the homicides appear legal, and year after year to repeatedly deny applications showing the exterminations to be illegal.

"In 1975, the Supreme Court of West Germany held that the clause in the German Constitution, 'Everybody has the right to life,' also 'includes unborn human beings,' that 'Abortion is an act of homicide,' and the state has a 'duty' under the Constitution 'to protect unborn life.' . . .It was just about 35 years ago that the German judges decided that certain persons were not protected by their law. And it is now of paramount international importance to determine how it is possible for the high courts of two major democratic nations, construing constitutional phrases that are substantially identical, to reach diametrically opposing conclusions about the legality of millions of premeditated homicides.

"That examination, presented in EXHIBIT A, surely permits reasonable people to conclude beyond a reasonable doubt that the Supreme Court closed its eyes on the Constitution and condemned to death millions of victims whom the Constitution endeavors to preserve; and there appears to be no defense that will not amount to a claim that the Supreme Court is above the law- that as Hitler was to Germany, so the Supreme Court is to America.

"If it be true, as Chief Justice Marshall once held(see Marbury v Madison, 1 Cranch 137, 163, 176, 178) that 'government of laws, and not of men,' founded in a 'written constitution' deriving its just power from the 'supreme' 'authority' of 'the people' is 'the greatest improvement on political institutions,' then the overthrow of that government of laws by lawless federal judges may be the most heinous crime in the history of government."

Wherefore, counsel demands opportunity to cross examine the evidence in Roe v Wade, and to present evidence on behalf of the unborn to establish their constitutionally protected right to life and that the Supreme Court obey the evidence.

Alan Ernest
Counsel

MOTION FILED
NOV 24 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI,
Attorney General of the
Commonwealth of Massachusetts, Et al.,
Appellants

v.

WILLIAM BAIRD, Et Al.,
Appellees

No. 78-330

JANE HUNERWADEL, Etc., Appellant

v.

WILLIAM BAIRD, Et Al.,

On Appeal From The United States District Court
For The District Of Massachusetts

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF AS AMICUS CURIAE BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE APPELLANTS

Alan Ernest
5713 Harwich Ct. #232
Alexandria, Va 22311

Counsel

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON BEHALF OF THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE APPELLANT

The Legal Defense Fund For Unborn Children is an organization whose interest is to protect the constitutional rights of the unborn.

The amicus curiae will present legal matter to the Court that is not presented by the parties.

The amicus alleges that Roe v Wade, 410 US 113 (1973) is based on false evidence and millions of lives have been unconstitutionally exterminated. Of course, this requires the overruling of that case.

If Roe v Wade were overruled, it would obviously be dispositive of this case.

As this Court has recognized, "There cannot even be the semblance of a full and fair hearing unless the . . . court actually reached and decided the issues of fact tendered." Townsend v Sain, 372 US 292 (1963). The amicus demands that the Court abide its own rulings, and fully and fairly hear the new evidence in the attached amicus brief, which shows that Roe v Wade is based on false facts and millions of lives have been unconstitutionally exterminated by false evidence.

When tribunals presume to decide the legality of exterminations, and refuse to fully and fairly hear the facts, then it can no longer be pretended that it is any government of Constitution and laws.

Alan Ernest
Counsel for Amicus

BRIEF

For the 20th time, the Supreme Court is petitioned to overrule Roe v Wade, 410 US 113(1973) on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated.

Can it be pretended that it is any longer the government of the United States,- any government of Constitution and laws,- wherein a Tribunal holding office for life, and asserting to be the ultimate arbiter, conducts proceedings to condemn millions of victims to death; fabricates evidence to make the exterminations appear legal; refuses to allow its evidence to be cross-examined; refuses to appoint counsel to defend the victims; refuses to allow evidence to be presented on behalf of the victims, even evidence showing that the victims are being unconstitutionally exterminated by false evidence?

SUMMARY OF ARGUMENT

1. The Supreme Court is petitioned to overrule Roe v Wade, 410 US 113(1973) on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated. See PART I, infra pages 2-6.

2. It is also alleged that, independent of the evidence in Roe v Wade, the procedures used by the Supreme Court to effect the Roe v Wade killings so palpably violate due process of law as to leave no question that the exterminations are unconstitutional. See PART II, infra pages 6-9.

3. It is further alleged that the Roe v Wade killings violate federal criminal statutes. The Supreme Court of the United States is charged with criminal falsehood and criminal extermination. See PART III, infra pages 9-11.

ARGUMENT

PART I

ROE v WADE IS BASED ON FALSE EVIDENCE

It is alleged that Roe v Wade, 410 US 113(1973) is based on false evidence and millions of lives have been unconstitutionally exterminated: Roe v Wade must be overruled. An EXHIBIT A, outlined below, has been repeatedly submitted to the Court to prove this charge.

EXHIBIT A was succinctly outlined in counsel's 16th petition to overrule Roe v Wade (Unborn Child Roe v John J. Sirica, Judge, United States District Court for the District of Columbia, (78)A-215):

"1. even the Supreme Court admitted in Roe v. Wade that if the unborn were 'a "person" within the language and meaning of the Fourteenth Amendment' then the case for abortion for convenience 'of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment,' and

"2. the express, universal terms of the Fourteenth Amendment ('nor shall any State deprive any person of life . . . without due process of law') on their face, protect the lives of the unborn, as everyone else, and

"3. the holdings of Chief Justice John Marshall (that can be traced through the Constitution, The Federalist Papers, and The Federal Convention of 1787) show that the Supreme Court had no lawful authority to construe an exception to express, universal terms (such as 'any person') unless the Court could prove the exception to the express, universal terms beyond a reasonable doubt, and show that 'had this particular case been suggested' to the framers the 'language would have been so varied, as to exclude it,' and

"4. the Supreme Court presented false evidence to support its conclusion in Roe v Wade that 'the word "person," as used in the Fourteenth Amendment, does not include the unborn,' and but for the false evidence, there is not even a credible foundation, much less a compelling one, for denying the protection of the express, universal terms 'any person' to the lives of the unborn, and

---

Summary of False Evidence

In introduction, at the time the Fourteenth Amendment was adopted in 1868, most states had already enacted positive statutes that made abortion a crime unless it were necessary to save the life of the mother. Within a few years, these criminal abortion statutes were virtually universal.

Consequently, any theory of a constitutional right to abortion on demand faced an impossible contradiction: How is it possible that the people who adopted the Fourteenth Amendment had enacted positive criminal statutes to protect unborn life, and at the same time, without a single word of explanation, intended to imply an exception to the express, universal terms that not "any person" can be deprived of life without due process of law, and to create a constitutional right to abortion on demand?

To resolve that fatal contradiction, the Court asserted the hypothesis that when the criminal abortion laws were first enacted, the laws were not intended to protect unborn life, but rather were only intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

(A.) The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v Wade, 35 L Ed 2d at 174. This was asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and Lloyd, A Hundred

Years of Medicine 19(1943). But this book merely described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The reference did not even mention the abortion operation.

However, the 19th century obstetric authorities throughout the Western World prove the Court's assertion of fact to be false. These 19th century obstetric authorities, based on their own experience in performing abortions, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96(1802)(English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530(4th American ed. 1852)(French physician); or "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293(1864)(American physician). In short, the obstetric authorities prove the Supreme Court's assertion of fact to be false.

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus" to "come on," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, 99. One 19th century physician traced this operation back almost 2000 years.

(B.) The Supreme Court next asserted, "Abortion mortality was high." Roe v Wade, 35 L Ed 2d at 174. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high" without any authority to support it. It is a naked assertion. The 19th century obstetric authorities also prove this assertion of fact to be false.

(C.) Upon the two false assertions of fact, the Supreme Court infers that "a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v Wade, 35 L Ed 2d at 174.

(D.) From the inference that the criminal abortion laws were not intended to protect the unborn, the Court further inferred that, likewise, the framers of the Fourteenth Amendment did not intend it to protect the lives of the unborn, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v Wade, 35 L Ed 2d at 180. This conclusion rests entirely on inference.

This pyramid of inference is shown to rest on assertions of fact that are false.

Moreover, as independent corroboration of the purpose of the criminal abortion statutes to protect the unborn, 19th century authorities in criminal law, e.g., 2 Archbold, Archbold's Criminal Procedure, Pleading and Evidence 295(6th ed 1853); medical jurisprudence, e.g., F. Wharton and M. Stille, M.D., A Treatise on Medical Jurisprudence 339, 927(2d ed. 1860); medicine, e.g., 13 Transactions of the American Medical Association 56-58 (1860); as well as state supreme courts, e.g., State v Moore, 25 Iowa 128, 135-136(1868), did expressly affirm that these criminal abortion statutes were intended to protect the lives of the unborn.

Consequently, not only is the Supreme Court's inference about the purpose of the 19th century abortion laws shown to rest on false assertions of fact, but there is no other evidence to come to the rescue and save the Court's conclusion. The 19th century authorities prove the very contrary.

In Summary, the Supreme Court bore the burden of proving beyond a reasonable doubt that the express, universal terms of the Fourteenth Amendment,

"any person," did not include the unborn. Yet, the Supreme Court did not cite one 19th century authority that expressly affirmed that the unborn were not persons within the language and meaning of the Fourteenth Amendment, or that there was a constitutional right to abortion on demand; and the Court's conclusion that the 19th century abortion laws were not intended to protect the unborn is shown to rest on false evidence. To the contrary, the 19th century authorities demonstrate that the people who adopted the Fourteenth Amendment not only intended to protect the lives of the unborn, but had already enacted criminal abortion statutes to do so in fact.

"5. the truthful history corroborates that the express, universal terms 'any person' include the unborn, as they do all categories of persons, and more certainly than many groups. The Supreme Court included corporations and aliens as a 'person' within the language and meaning of the Fourteenth Amendment merely on the strength of the express, universal terms 'any person,' without any independent corroborating evidence whatsoever. (The unborn being the only persons ever excluded from the terms 'any person')

"In short, EXHIBIT A shows that the Supreme Court violated the very letter of the Constitution as well as its spirit, and condemned millions of victims to death whom the Constitution endeavors to preserve. . . . . (A)nd there appears to be no defense that will not amount to a claim that the Supreme Court is above the law."

PART II
THE COURT'S PROCEDURES ARE UNCONSTITUTIONAL

Completely independent of the Court's evidence, supra PART I, it is also alleged that the procedures used by the Supreme Court to effect the Roe v Wade killings are in such manifest conflict with due

process of law as to leave no doubt that the killings are unconstitutional.

As counsel's 17th petition to overrule Roe v Wade pointed out (Gaetano v. Earl Silbert, United States Attorney for the District of Columbia, No. 78-427):

"The evidence in Roe v Wade aside, the procedures used to effect the Roe v Wade killings alone condemn the killings as illegal. The Nuremberg court, in outlining the case against the Nazi judicial system, noted that many victims were executed after trials which 'did not approach even a semblance of fair trial':

'In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them. . . . They were ... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel.' [citation omitted]

"The U.S. Supreme Court has, in broad form, used these very procedures to effect the Roe v Wade killings. For example, in Roe v Wade, the Court used evidence found by itself, which the parties had not cross examined in a judicial proceeding. The Attorney General of Georgia, a party, requested leave to cross examine the Supreme Court's evidence:

'The Court has taken judicial notice of innumerable facts . . . some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter evidence since they form the foundation of the Court's opinion.' Petition for Rehearing at 4, Doe v Bolton, 35 L Ed 2d 201(1973).

"But the Supreme Court would not allow its evidence to be cross examined by the party. Pet. Rehearing denied, Doe v Bolton, 35 L Ed 2d 694(1973).

"And year after year, the Supreme Court has denied these applications to present evidence on behalf of the unborn victims to show that the unborn are persons whose lives are protected by the U.S. Constitution. This new evidence shows the Supreme Court's evidence to be false; and the Supreme Court will not allow the evidence to be presented.

[For example, in Planned Parenthood of Central Missouri v Danforth, 49 L Ed 2d 788(1976)(the first major abortion case after Roe v Wade) eight lawyers, as counsel or amici, submitted an amicus curiae brief, outlining the evidence in PART I, supra, and alleging that "newly discovered evidence indicates that Roe v Wade rests upon factual errors that require the overruling of that case."

Since the purpose of amicus briefs is to present legal matter to the Court, not presented by the parties, so that the Court will not go wrong on vital national affairs, the Court seldom rejects amicus briefs. Stern and Gressman, Supreme Court Practice 481-82(4th ed 1969). The landmark constitutional decision which applied the Fourth Amendment exclusionary rule to the States was predicated upon argument by amicus curiae, not the parties. Mapp v Ohio, 367 US 643, 646 n.3(1961). And in the Missouri abortion case it was only the amicus brief that presented the newly discovered evidence showing Roe v Wade to be based on false evidence.

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"The second, set out in Roe v Wade, is for a Tribunal holding office for life(without assistance of counsel to defend the victims)to rule the victims out of the human race as inferiors, in violation of the very letter and spirit of the Constitution, falsifying evidence to make the homicides appear legal, and year after year to repeatedly deny applications showing the exterminations to be illegal.

"In 1975, the Supreme Court of West Germany held that the clause in the German Constitution, 'Everybody has the right to life,' also 'includes unborn human beings,' that 'Abortion is an act of homicide,' and the state has a 'duty' under the Constitution 'to protect unborn life.' . . .It was just about 35 years ago that the German judges decided that certain persons were not protected by their law. And it is now of paramount international importance to determine how it is possible for the high courts of two major democratic nations, construing constitutional phrases that are substantially identical, to reach diametrically opposing conclusions about the legality of millions of premeditated homicides.

"That examination, presented in EXHIBIT A, surely permits reasonable people to conclude beyond a reasonable doubt that the Supreme Court closed its eyes on the Constitution and condemned to death millions of victims whom the Constitution endeavors to preserve; and there appears to be no defense that will not amount to a claim that the Supreme Court is above the law- that as Hitler was to Germany, so the Supreme Court is to America.

"If it be true, as Chief Justice Marshall once held(see Marbury v Madison, 1 Cranch 137, 163, 176, 178) that 'government of laws, and not of men,' founded in a 'written constitution' deriving its just power from the 'supreme' 'authority' of 'the people' is 'the greatest improvement on political institutions,' then the overthrow of that government of laws by lawless federal judges may be the most heinous crime in the history of government."

Wherefore, counsel demands opportunity to cross examine the evidence in Roe v Wade, and to present evidence on behalf of the unborn to establish their constitutionally protected right to life and that the Supreme Court obey the evidence.

Alan Ernest
Counsel

Supreme Court, U. S.
FILED
JAN 27 1979
RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI,
Attorney General of the
Commonwealth of Massachusetts, Et al.,
Appellants

v.

WILLIAM BAIRD, Et Al.,
Appellees

No. 78-330

JANE HUNERWADEL, Etc., Appellant

v.

WILLIAM BAIRD, Et Al.,

On Appeal From The United States District Court
For The District Of Massachusetts

On The Motion For Appointment Of
Alan Ernest As Counsel, etc.,

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING
WITH PETITION FOR REHEARING

Alan Ernest
5713 Harwich Ct. #232
Alexandria, Va 22311

Counsel

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

On January 8, 1979, the Court denied the MOTION FOR APPOINTMENT OF ALAN ERNEST AS COUNSEL OR GUARDIAN AD LITEM FOR UNBORN CHILDREN.

Due to the recent discovery of extraordinary new evidence, perhaps unparalleled in American legal hsitory, the court is moved for leave to file a petition for rehearing. This new evidence was not presented by the parties.

A brief in support of the motion is attached hereto. The new evidence is outlined therein.

The new evidence shows that many of the killings that Roe v Wade asserted to legalize were murder in the first degree in 1868.

Obviously, children whose lives were protected by the murder statutes in 1868 are persons within the language and meaning of the Fourteenth Amendment. Absent an amendment to the Constitution, the killings are still murder. Roe v Wade cannot pretend to legalize murder.

Upon the new evidence presented herein, the Court is moved to grant this motion to file a petition for rehearing.

ALAN ERNEST
Counsel

BRIEF

SUMMARY OF ARGUMENT

MANY ROE v WADE KILLINGS ARE MURDER

The evidence will show that many of the killings permitted by Roe v Wade, 410 US 113(1973) were murder in 1868. Since the killings were murder in 1868, then absent a constitutional amendment, the killings are still murder, and Roe v Wade is no law at all.

ARGUMENT

1. Introduction to Evidence

The evidence presented herein will show that, at the time the Fourteenth Amendment was adopted in 1868, the unlawful killing, with malice aforethought, of a child born alive was murder. Killings of children born alive were not treated as a special category, as was abortion.

It is thus absolutely indispensable to examine what "born alive" meant in 1868. It is obvious that, if the life of a child born alive was protected by the murder laws in 1868, then it is a person within the language and meaning of the Fourteenth Amendment.

The evidence shows that in 1868, born alive did not mean natural birth after nine full months gestation; nor did it mean birth after viability ("that is, potentially able to live outside the mother's womb, albeit with artificial aid." Roe v Wade, 35 L Ed 2d at 181). If abortion resulted in a live but unviable child that died as a consequence of its not being able to survive outside the womb, it was murder and punishable by the death penality.

The evidence shows that the hysterotomy is a common method of performing abortions under Roe v Wade. This is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. The legal authorities show that in 1868, such a killing was murder and punishable by the death sentence.

In summary, what was murder in 1868, can not now be decreed a constitutional right. Without an amendment to the Constitution, the killings must still be murder, and the Justices who permitted these killings may be guilty of mass murder in the first degree. This is still punishable by the death sentence in many states.

2. The English Law

The English law, as reflected in the writings of Coke(3 Inst. 50), Hawkins(1 Hawkins Bk.1, ch. 16) and Blackstone (4 Bl. Com. 198) defined the felonious killing of a child "born alive" as murder, even if the child received the fatal wound in the womb.

These authorities were followed by the English courts in permitting prosecutions of the killing of children born alive as murder. Rex v Senior, 1 Moody CC 346(1832); Reg. v Trilloe, 174 Eng. Rep. 674(1842); Reg. v West, 2 C & K 784(1848).

Most critically, in the English law, a child did not have to be viable to be born alive. In 1848 the leading case of Regina v West, 2 C & K 784, was decided. The indictment for murder alleged that the defendant had inserted a "certain pin" "upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Id., 784-85. The child died shortly thereafter. A

"medical witness" had testified that:

"(I)t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Id., at 786.

The judge, relying on Coke and Blackstone, instructed the jury:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. .... I am of the opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Id., at 788.

The case of Regina v West, supra, was presented by the leading English writers as the correct statement of the law of murder. See, e.g., 2 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783(Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-72 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516(Penrose Am. ed. 6th ed 1866). Consequently, the evidence shows that in the English common law, the abortion of a quick but unviable child that resulted in the child being born alive so prematurely that its death was caused by its inability to survive outside the womb, was murder.

3. The American Law Of Murder In 1868

The English common law of murder of children born alive is significant since American courts used the English common law to construe their murder statutes. Clarke v State, 117 Ala 1(1898); Hamilton v United States, 26 App. D.C. 382(1905).

American courts cited Coke, Hawkins, Blackstone, and the English court decisions, as authoritative precedents on the law of homicide of children born alive. See, e.g., Clarke v State, 117 Ala. 1(1898); State v Winthrop, 43 Iowa 519 (1876). By 1868, leading American legal authorities had specifically cited Regina v West, supra, as the correct law of murder of a child born alive. (As already noted, that case held that if a criminal abortion resulted in the premature delivery of a quick but unviable child that died after delivery as a consequence of its being so prematurely delivered that it could not survive outside the womb, it was murder.) See, e.g., F. Wharton, A Treatise on the Law Homicide in the United States 96-97(1855). By 1868, this appears to be the uncontradicted view.

Consequently, the evidence shows that the life of a quick but unviable child born alive was protected by the murder laws in 1868.

4. The Law Of Murder In 1868 And The Fourteenth Amendment

Since the evidence shows that the life of a quick but unviable child was protected by the murder laws in 1868, the evidence likewise establishes that the child so born alive is a person within the language and meaning of the Fourteenth Amendment.

By seizing upon viability, Roe v Wade permits the killings of quick but unviable children born alive. The Supreme Court presumed to decree the killing of these children to be a constitutional

right without any examination whatsoever to see if these children were persons within the language and meaning of the Fourteenth Amendment. It is a naked decree without any investigation into the law of murder of children born alive.

This raises the question,- Does the Supreme Court have the Hitler-like power to decree murder to be a constitutional right? If invalids were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill invalids? If Jews were protected by the murder laws in 1868, can the Supreme Court decree, without evidence or investigation, a constitutional right to kill Jews? If newspaper editors were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill newspaper editors?

No doubt the Supreme Court bears the burden of proving, by evidence so conclusive that it will not admit of a rational doubt, that it possesses the power to decree murder to be a constitutional right.

5. The Hysterotomy Abortion Under Roe v Wade

A common way to perform abortions under Roe v Wade is by hysterotomy. See, e.g., Commonwealth v. Edelin, 359 NE 2d 4 (Mass. 1976). A hysterotomy is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. See, 1 Hearings Before The Subcommittee On Civil And Constitutional Rights Of The Committee Of The Judiciary, House of Representatives On Proposed Constitutional Amendments on Abortion 397(GPO 1976).

As established by medical testimony during the 1976 House Abortion Hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry. . . .Almost all are born alive." Id., at 397.

Consequently, by definition, in 1868, these hysterotomy abortions could have been prosecuted as murder.

6. ROE v WADE AND MISTAKE OF LAW

The Supreme Court itself has recognized that constitutional provisions against ex post facto laws do not apply to judicial decisions. Ross v Oregon, 227 US 150(1913). Consequently, if Roe v Wade is a mistake of law, then mass murder is being perpetrated in America. The Roe v Wade hysterotomy killings, by definition under the common law and thus constitutional law, violate the positive criminal murder statutes throughout the United States.

The killings of children born alive have been prosecuted as murder in the first degree, Comm. v Harmon, 4 Barr. 269(Pa 1846)(child thrown in creek); or murder in the second degree, Clarke v State, 117 Ala. 1 (1898)(wife beaten, child die from injuries) or manslaughter, People v Chavez, 77 Cal. App. 2d 621(1947)(child neglected),- according to the facts of the particular case, as in any other homicide.

In connection with these judicial killings, it is relevant to note that the Supreme Court decreed murder to be a constitutional right without any examination whatsoever of the law of murder of children born alive. And as Abraham Lincoln noted, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him." 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. See, e.g., 3 Wharton's Criminal Law and Procedure, Sec. 1308, p. 673(12th ed 1957).

Consequently, rational people are entitled to believe, and a jury may be permitted to find, that the process by which the Supreme Court decreed

murder to be a constitutional right is perjury or criminal fraud. It seems reasonable that such judicial killings, after such prolonged deliberation and adherence, could be prosecuted as murder in the first degree. Many states still punish mass murder in the first degree with the death sentence.

It may be that the judges responsible for the judicial killings did not believe that they were breaking the law. But as Mr. Justice Oliver Wendell Holmes once wrote, "Ignorance of the law is no excuse for breaking it." "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but.. ...the lawmaker has determined to make men know and obey." Holmes, The Common Law 41(Howe ed 1963).

It now full well appears that the Justices of the Supreme Court of the United States have presumed to decree murder to be a constitutional right, without any evidence or examination whatsoever, with the death penalty the possible consequence of their decision being a mistake of law.

It now appears that, unless the Supreme Court can prove by evidence, beyond a doubt based on reason, that it has the Hitler-like power to decree mass murder to be a constitutional right, then Roe v Wade is just such a mistake of law.

CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

The evidence proffered herein would appear sufficient to permit reasonable people to conclude beyond a reasonable doubt that the Supreme Court of the United States has committed mass murder in the first degree. The evidence would appear sufficient for reasonable people to conclude that, upon a scale never seen before in the peacetime history

of the world, "The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, 3 Trials of War Criminals Before The Nuernberg Military Tribunals 985(GPO 1951).

If the United States were being ruled over by a Tribunal of Murderers, holding office for life, nakedly decreeing mass murder to be a constitutional right, in open defiance of the evidence, and presuming to be blindly obeyed by all courts, executives, legislatures, and people whatever without question, regardless of the evidence, then surely it would be the most astounding event in the legal history of the human race.

Alan Ernest
Counsel

PETITION FOR REHEARING

On January 8, 1979, the Court denied the MOTION FOR APPOINTMENT OF ALAN ERNEST AS COUNSEL OR GUARDIAN AD LITEM.

Due to the discovery of extraordinary new evidence, outlined in the attached brief in support of the motion to file this petition, the Court is requested to grant this petition for rehearing.

The new evidence shows many Roe v Wade killings to be murder in the first degree.

Roe v Wade must be overruled.

ALAN ERNEST
Counsel

CERTIFICATE OF COUNSEL

Counsel herein certifies that this petition for rehearing is presented in good faith and not for delay.

ALAN ERNEST
Counsel